93-781

No. 93-___

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In The

Supreme Court of the United States

October Term, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON and ANDREW HAYDEN,

Petitioners,

vs.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM, Governor of the State of Alabama; JIM BENNETT, Secretary of State,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

In *Growe v Emison*, __ U.S. __, 113 S.Ct. 1075, 122 LEd2d 388 (1993), this Court reversed a district court for failing to defer to a state court in a redistricting case. In light of that case, the following questions are presented here:

1. Where the State's failure to adopt a valid congressional redistricting plan led the district court to adopt its own interim plan in time for the 1992 elections, did the courts below err in barring a state court from adopting a plan for the 1994 elections?

2. Where the district court's 1992 order acknowledged that its interim plan would be superseded if the Legislature adopted a plan for subsequent elections, did the courts below err by not according similar deference to the state judicial process?

3. Do principles of federalism bar federal courts from transforming their interim redistricting plans into permanent ones by enjoining the State's judicial redistricting process?

Parties

The parties in the court of appeals are all shown in the caption. Other parties who appeared in the district court but did not appear in the court of appeals are listed in the footnote.[1]

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[1]James H. Evans, Attorney General of Alabama, and Probate Judges Lionel Noonan, Harry D'Olive, Devon Wiggins, Otha Lee Biggs, Jerry Bogan, Clarence Watters, and Tom W. Turner were defendants in the district court in 1992, but made no appearance in the 1993 injunction proceedings in the district court or the court of appeals. Attorney General Evans has appeared as the attorney for Secretary of State Bennett.

Table of Contents

Questions Presented i

Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of Facts 3

Reasons for Granting the Writ 12

I. Under *Growe v. Emison*, the district court was obligated to defer to the state court proceeding. 12

II. The fact that the district court adopted a plan for the 1992 elections did not render *Growe v. Emison* inapplicable for elections in later years. 14

III. The lower courts' application of doctrines like res judicata to the district court's 1992 interim plan is at odds with the basic nature of redistricting cases and the fundamental federalism principles of this court's decision in Growe v. Emison. 16

Conclusion 21

Table of Authorities

Cases:

Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975) 18

Camp v. Wesch, 112 S.Ct. 1926 (1992) 7

Connor v. Williams, 404 U.S. 549 (1972) 14

Dore v. Kleppe, 522 F.2d 1369 (5th Cir. 1975) 18

Figures v. Hunt, 113 S.Ct. 3233 (1993) 8

Growe v Emison, __ U.S. __, 113 S.Ct. 1075, 122 LEd2d 388 (1993) . . . . . i, 5, 9-14, 16, 19, 20

O'Shields v. McNair, 254 F.Supp. 708 (D.S.C. 1966) . . 16

Opinion of the Justices, 254 Ala 185, 47 So.2d 714 (1950) 14

Orans v. Rockefeller, 17 N.Y.2d 107, 216 N.E.2d 311 (1966) 16

Parnell v. Rapides Parish School Board, 563 F.2d 180 (5th Cir. 1977) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 19

Scott v. Germano, 381 U.S. 407 (1965) 5, 10

Screvane v. Lomenzo, 382 U.S. 11 (1965) 16

Sinkfield v. Bennett, No. 93-689 (Cir. Ct., Montgomery Co., Ala) 4

State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967) 16

Travia v. Lomenzo, 382 U.S. 9 and 382 U.S. 287 (1965) 16

Upham v. Seamon, 465 U.S. 37 (1982) 19

Whitcomb v. Chavis, 403 U.S. 124 (1971) 18

WMCA v. Lomenzo, 238 F.Supp. 916, 246 F.Supp. 953 (S.D. N.Y. 1965) 15

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1651(a) 2

28 U.S.C. § 2283 . . . . . 2, 8

28 U.S.C. § 2283 8

42 U.S.C. § 1983 3

U.S. Constitution, Amendment XIV, Sec. 1 2

Opinions Below

Review is sought of a federal injunction which bars a state court from hearing a suit to redistrict Alabama's congressional districts. The Order of the United States Court of Appeals for the Eleventh Circuit (October 25, 1993), and the Opinion which followed (October 27, 1993), are reprinted at 1a and 3a. The court of appeals decision affirmed and reinstated an injunction which had been entered by Hon. W. Brevard Hand, Jr. (July 13, 1993). Judge Hand's Order of Injunction, and his accompanying Memorandum Opinion, are reprinted at 22a and 25a.

The injunction under review grew out of a three-judge district court Memorandum Opinion and Final Judgment (March 9, 1992), which adopted an interim redistricting plan in time for the 1992 elections. This decision is reported at 785 F.Supp. 1491 (S.D. Ala. 1992), and is reprinted at 1b and 24b. Related Orders are reprinted at 26b, 27b, and 28b.

Following Judge Hand's 1993 injunction, petitioners have moved in the courts below for stays pending appeal and pending certiorari, and the successive Orders of the courts below are reprinted at 1c, 6c, and 8c.

Jurisdiction

The Order of the court of appeals was entered on October 25, 1993. This Court's certiorari jurisdiction arises under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Art. I, Sec. 2 of the Constitution of the United States:

> "The House of Representatives shall be chosen every second Year by the People of the several States . . ."

Amendment XIV, Sec. 1:

> " . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement of Facts

This petition arises from a judgment of the court of appeals affirming an injunction (entered by Hon. W. Brevard Hand) which had enjoined a state court redistricting lawsuit.

THE 1992 CASE.

In late 1991, after the Alabama Legislature failed to adopt a Congressional redistricting plan, respondent Wesch filed a malapportionment suit in the United States District Court for the Southern District of Alabama under 42 U.S.C. § 1983. On March 9, 1992, following a trial, the three-judge district court issued its decision striking down the existing 1981 congressional districting statute. See p. 1b. Then, with the start of the election process (the deadline for candidates to qualify for party primaries) less than a month away, the district court adopted its own plan (based largely on a plan presented by respondent Wesch) and ordered it into effect because it opined that "the only means by which Alabama's 1992 congressional primaries may be held in a timely manner . . . is pursuant to an interim districting plan ordered by this court." See pp. 6b-7b.

Recognizing its obligation to defer to timely State action, the district court said its interim plan would be superseded if the Legislature's plan (which had been recently enacted and submitted for Voting Rights Act preclearance) received preclearance by March 27 (the week before the candidate qualifying deadline). See p. 19b. On March 27, 1992, the Attorney General denied preclearance to the Legislature's plan.

The three-judge court's Order of March 9, 1992, further ordered that elections in years *after* 1992 were also to be conducted under the court's interim plan (again unless the Legislature enacted and received preclearance for a plan "in time for congressional elections to proceed without delay under then applicable state and federal law"). See p. 20b.[2]

All the district court's references to State action which would supersede the interim plan cited only the State Legislature, and did not mention the State judiciary.

The district court's interim plan was in fact used in the 1992 congressional elections.

THE 1993 CASES.

State court. In 1993, the Alabama Legislature again failed to enact a congressional districting plan. Petitioners filed suit in the Circuit Court of Montgomery County, Alabama, asking the state court to redistrict both the State Legislature and the congressional districts.[3] *Sinkfield v. Bennett*, No. 93-689.

Petitioners' state court suit alleged that the State Legislature had defaulted in its obligation to redraw the districts in question, thus violating petitioners' rights under state and federal law. The state court suit did not challenge or ask for any ruling on the federal district court's 1992 interim plan, but simply alleged that because

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[2]Appeals were taken to this Court from two different aspects of the district court's interim 1992 plan, and this Court affirmed in both appeals. See discussion, *infra*, at note 6.

[3]The state court has subsequently redistricted the State Legislature. That issue is not presented in this petition.

the State Legislature had not acted, the petitioners were entitled to have the state court carry out the State's continuing obligation to adopt a plan for subsequent elections (*i.e.*, 1994 and after).

The Secretary of State (the State's chief election officer) answered the complaint, admitted jurisdiction, admitted the State Legislature's default, and asked that the case be advanced on the state court's docket for prompt resolution in the interest of the voters of Alabama. The state court set a trial date in July.

Federal court. At that point, respondent Wesch moved in the district court to enjoin the state court proceedings, on the grounds of the federal court's 1992 injunction against implementation of any different plan except for one drawn by the State Legislature.

On July 13, 1993, over the objection (made by both the petitioners and the Secretary of State) that such an injunction was barred by this Court's decisions in *Scott v. Germano*, 381 U.S. 407 (1965), and *Growe v. Emison*, 113 S.Ct. 1075 (1993), Judge Hand granted a sweeping injunction ordering not only the petitioners but also the Governor of Alabama and the Secretary of State of Alabama immediately to dismiss the state court action, and barring each of them from bringing any state court proceeding which related to congressional districting or "which seeks to alter the congressional districting plan adopted by the three-judge court in this action." See p. 23a.

Petitioners immediately appealed and moved for a stay pending appeal. Judge Hand denied the stay, but a panel of the court of appeals granted the stay on August 13, 1993. See p. 6c.

Throughout the appellate process, including the stay applications and the briefing and oral argument, the Secretary of State of Alabama (represented by the Attorney General of Alabama) and the Governor of Alabama supported the state court's priority and urged reversal of Judge Hand's injunction.

Once Judge Hand's injunction was stayed pending appeal, the state court set a new trial date, allowed respondent Wesch to intervene, and tried the case on October 1, 1993. Post-trial briefs had been filed and the case was ripe for decision by the state court when, on October 25, 1993, the court of appeals entered its order affirming Judge Hand's decision, lifting its stay, and reinstating the injunction against the state court proceedings. See p. 1a.

This petition followed.[4]

THE GROUNDS FOR DECISION BELOW.

The basis for the injunction was stated somewhat differently in the courts below, but the rationale was the same, and relied on the proceedings in the 1992 federal trial which had produced the three-judge district court's interim plan.

The 1992 trial. In the 1992 case brought by respondent Wesch, petitioners did not appear directly, but there was an intervenor, respondent Michael Figures, who was allowed to represent a class of all African-American voters in Alabama, a class that includes the petitioners. There

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[4]Petitioners sought a stay pending certiorari from the court of appeals, which was denied on November 2, 1993. They then sought a stay from the Circuit Justice at the same time as the filing of this certiorari petition.

was no dispute in the 1992 trial about the invalidity of the pre-existing 1981 congressional district plan, so the chief focus was on the interim plan to be adopted. See p. 4b.

The three-judge court had six plans before it, of which it considered only two because the other four did not achieve population equality. See pp. 7b-8b. The plan adopted by the district court (which was based on one of these two) contained one district which was approximately 65% black, based not on any legal determination of the district court but on a stipulation of the parties that such a district could and should be created.[5] The district court also noted that one of the four plans that it had declined to consider (because of its population inequality) created two majority-black districts, but it pointed out that the Figures intervenors doubted whether this plan created real opportunities for black voters to elect candidates of their choice.[6] See p. 9b.

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[5]The district court said the stipulation had relieved it of any obligation "to make a judicial determination relative to what § 2 [of the Voting Rights Act] requires under the circumstances present in this case," and therefore it had not made any such determination. See p. 14b.

[6]Two appeals on tangential grounds were taken from the district court's order adopting the interim plan, and both were summarily affirmed without opinion. First, the Secretary of State unsuccessfully appealed on the ground that the district court should have picked as its interim plan the plan favored by the State Legislature. *Camp v. Wesch*, 112 S.Ct. 1926 (1992). The U.S. Attorney General had interposed an objection to the Legislature's plan before the district court had rejected it.

After the U.S. Attorney General objected to the Legislature's plan, the Figures intervenors moved under Rule 60(b) to have the three-judge court abandon the interim plan it had adopted and instead draw a plan with two majority-black districts. Figures did not present a

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Judge Hand's theory in 1993. In enjoining the state court proceedings in 1993, Judge Hand held that he was authorized (even as a single judge) to do so under the "relitigation exception" to 28 U.S.C. § 2283, in order to effectuate what he called the district court's "final judgment" adopting the interim plan. See p. 3c. He treated the 1992 proceedings and the adoption of the interim plan as a full determination on the merits of every issue, treated the affirmances of this Court on the two appeals as sealing the three-judge court decision, and referred to the fact that the petitioners, as African-Americans, were members of the class represented by intervenor Figures. See p. 2c.

He went beyond the petitioners, however, and said that no citizen could ever challenge the interim plan in state court:

> "If the Legislature of the State of Alabama is content to continue the constitutional plan adopted in this action and now in force in the State of Alabama, then it does not lie with individual citizens to attack that decision in state court because they happen to disagree with it. The failure of the Legislature to alter a constitutional plan, whether adopted by a federal court or previously adopted by the Legislature itself, cannot be the basis for jurisdiction by the state courts to undertake to alter such a constitutional plan." (See p. 4c.)

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[6](...continued)
concrete plan with his motion. By this time, the three-judge court's deadline was past, and the candidate qualifying deadline itself was days away. The district court denied the motion. Figures appealed the denial as an abuse of discretion, and this Court affirmed. *Figures v. Hunt*, 113 S.Ct. 3233 (1993).

As to the petitioners' claim that this Court's cases have accorded state courts as well as state legislatures priority over federal courts, Judge Hand held squarely that *Growe v. Emison* is nothing more than a decision about a "race to the courthouse":

> "*Growe* does not stand for the proposition that a State court is a co-equal branch of government with respect to overturning a districting plan enacted by a federal court and affirmed on appeal by the United States Supreme Court prior to any effort by such state court to address any issue relating to reapportionment and redistricting. By contrast, *Growe* stands only for the proposition that 'in the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.'" (See p. 27a.)

Finally, Judge Hand indicated that a state citizen's interest in having this "highly political" task performed by his State government rather than imposed by the federal government is of no consequence:

> "As a matter of law, no harm can result to the *Sinkfield* parties from the conduct of further elections under a plan which has already been held valid by the Supreme Court." (See p. 4c.)

The court of appeals' theory. The court of appeals took the same approach in affirming Judge Hand. The court began by observing that "the three-judge district court in this case invested a great deal of time and other resources in the arduous task of reapportioning Alabama's congressional districts." Petitioners' desire for a State-

drawn redistricting plan as a "system of redistricting at will," which, if allowed, "would effectively strip all federal courts of the ability to meaningfully redistrict." See p. 14a.

The court of appeals treated this case as a simple application of res judicata, which thus precluded a court from considering, among other things, the "appropriate number of majority African-American districts," (because that issue had been "aired" in the district court), and the right to a State court plan (because that issue "arises from the same nucleus of operative facts as the claims adjudicated by the federal court." See pp. 15a-16a.[7] The court of appeals cited no case applying res judicata to a redistricting suit—especially to an interim plan drawn by a federal court.

Turning to *Growe v. Emison*, the court of appeals followed Judge Hand in reading that case as applying only to a race to the courthouse. See p. 20a. It specifically

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[7]In its opinion, the court of appeals made several important factual errors. The most significant were:

> (1) its repeated assertion that petitioners' claim of a right to go to state court was based on a claimed right to a plan with two majority-black districts: this was erroneous because petitioners' sole federal claim was based on the principles expressed in cases like *Scott v. Germano* and *Growe v. Emison*.
>
> (2) its assertion that the plan petitioners wanted to present in the state court was the same as one already rejected in the district court, which was erroneous because the 1993 Reed plan (proposed by Sinkfield) had never been presented to the federal district court. There is no evidence in the record suggesting that the 1993 Reed plan had ever been seen by the district court.

rejected the argument that *Growe* "declared state courts to be the equivalent of state legislatures in redistricting matters" (see p. 18a), an argument made both by the petitioners and by the governor and Secretary of State of Alabama:

> "Once a federal court enters a final judgment adopting a valid redistricting plan, nothing in *Growe* vitiates the res judicata effect of that judgment." (See p. 19a.)

Under the court of appeals' view of *Growe*, "once it is apparent that a state court . . . will not develop a redistricting plan in time for an upcoming election," the time for deference is over: not simply for that election year, but for the entire decade. See p. 19a. Thus, according to the court of appeals, the election emergency that justified the district court in drawing an *interim* plan also turned that interim plan—as far as state *courts* are concerned—into a *permanent* plan for the decade.

The court of appeals reiterated that the interim plan would remain in effect until the Legislature enacted a valid plan, but concluded that the judicial relief sought by petitioners was "redistricting on demand," which it said flatly was not authorized by *Growe v. Emison*. See p. 20a.

Reasons for Granting the Writ

This Court should grant a writ of certiorari because the court of appeals decision squarely conflicts with this Court's decision in *Growe v. Emison,* 113 S.Ct. 1075 (1993). See this Court's Rule 10(c).

Growe v. Emison was intended to remind federal courts of the need to defer both to state legislatures and state courts in the inherently sensitive area of redistricting. The approach taken by the courts below in this case is a direct challenge to *Growe.* The decision below means that *Growe* is a one-time "window of opportunity," and if the state courts do not act before an election takes place, the time for deferral is *over*, for the rest of the decade.

Ironically, the lower courts agreed that the use of a federal court plan in one election does not end deferral to a *state legislature*, only to the *state judiciary.* Such a view would *keep* the federal courts very heavily in the redistricting business because it would give a green light to the state institution least likely to act after one election has passed, while putting a red light up for the state institution most likely to act.[8]

I. Under *Growe v. Emison,* the district court was obligated to defer to the state court proceeding.

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[8]This is not surprising. A court generally has to decide whatever cases litigants bring to it, but a legislature does not have to pass a bill. Legislative inertia may mean, for example, that the same political deadlock that caused the legislature to fail to pass a plan initially is likely to continue. In addition, where (as is not the case here) the legislators were themselves elected under the federal court-drawn plan, they are likely to be satisfied and see no reason why they should change a plan that resulted in their election.

Growe v Emison, __ U.S. __, 113 S.Ct. 1075, 122 LEd2d 388 (1993), reiterated the basic proposition that prime responsibility for state redistricting lies with the State, and made it clear that the "State," for such purposes, means not only the State's legislature but also the State's judiciary.

Since the principal responsibility lies with the State, the role of the federal judiciary is as a secondary guarantor of the voters' constitutional rights, *i.e.*, the federal judiciary is to step in only when necessary—and only for as long as necessary—to insure that an upcoming election is held under a districting plan that complies with all constitutional requirements. The nature of the federal court's role thus requires it to defer to state authorities—legislative *or* judicial.

In *Growe*, a federal court in Minnesota was reversed precisely for failing to defer to the state's judiciary, and that is exactly what has happened in this case. Initially the State of Alabama failed in its obligation to redraw its congressional districts in time for the 1992 election process. It therefore became necessary for the district court to draw an *interim* plan in order to protect the equal voting rights of Alabama's voters.

Now, however, the State of Alabama is coming forward to meet its obligations in time for the 1994 elections (and thereafter). The courts below recognized that the adoption of an interim plan in 1992 did not prevent the State from adopting a plan in later years which would supersede the district court's plan. However, the courts below went awry by refusing to recognize that under *Growe v. Emison* such a superseding plan might come from the State judiciary as well as the State Legislature.

In attempting to make a distinction between the two, the courts below did precisely what this Court rejected in *Growe v. Emison.*

II. The fact that the district court adopted a plan for the 1992 elections did not render *Growe v. Emison* inapplicable for elections in later years.

The courts below erred because they seem to have believed that the rule of *Growe v. Emison* has to do only with a race to the courthouse, and that once the district court adopted an interim plan for use in the 1992 elections, it no longer had to defer to state courts, even for elections in later years.

But a districting plan affects voters not just once but every time there is a new election. Every time new congressional elections roll around without the State of Alabama carrying out its responsibility under both the state and federal constitutions to redraw congressional districts, a new violation of the rights of Alabama's citizens occurs. *Opinion of the Justices,* 254 Ala 185, 47 So.2d 714 (1950). For this reason, any federal court plan adopted because of a State's default is by nature an interim plan, and is always subject to being superseded by a valid State plan, even in between censuses. See *Connor v. Williams,* 404 U.S. 549, 552 n.4 (1972).

The lower courts understood the interim nature of the district court's plan *in part,* that is, they understood that the interim plan would be superseded when and if the *Alabama Legislature* adopted a plan. See pp. 20a, 25b. Curiously, however, they failed to understand that *Growe v. Emison* means the same rule applies to new or superseding State plans adopted by the State *judiciary.*

The district court's orders show a repeated failure to understand this rule. For example, the district court erroneously portrayed its interim congressional redistricting plan as a final plan that by legislative inaction the State of Alabama effectively has adopted as its own. "[T]he State of Alabama," said the district court, "now has in place a constitutional plan by which congressional members have and may be elected and nothing has been offered to this Court that alters this fact." See p. 3c.

But it is not the State of Alabama which has a plan in place; it is the Government of the United States, acting through its district court. And while the federal court's interim plan may remain in effect if the Government of Alabama continues to default, it is not a federal court's proper function to block the State of Alabama—through a court or any other body chosen by the State—from superseding the interim plan.

Therefore, when the district court said "it does not lie with individual citizens to attack" what it perceived to be the Alabama Legislature's "content[ment]" with the federal court's interim plan (see p. 4c), it was interfering directly with the sovereignty of the State of Alabama and repudiating the right of Alabama's citizens to demand action from the State judiciary to enforce their political rights, both state and federal.

Redistricting jurisprudence has other examples of continued State court primacy even after an election has been run under a federal court order. In New York in 1965, a federal court ordered that year's elections held under a plan upheld by it[9] (and, indeed, was affirmed by this Court when it enjoined a state court from interfering

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[9] *WMCA v. Lomenzo*, 238 F.Supp. 916, 246 F.Supp. 953 (S.D. N.Y. 1965).

because the election was imminent).[10] Yet following that election the responsibility returned to the state court which thereupon drew a new redistricting plan for use in 1966 elections. *Orans v. Rockefeller,* 17 N.Y.2d 107, 216 N.E.2d 311 (1966).

Likewise, in South Carolina in 1967, a districting plan approved by a federal court and used in the 1966 elections was nullified for future elections by a later state court decree. *State ex rel. McLeod v. West,* 249 S.C. 243, 153 S.E.2d 892 (1967). See *O'Shields v. McNair,* 254 F.Supp. 708 (D.S.C. 1966)(three-judge court). When the State court struck down the very plan that the federal court had just approved, it provided that its decision affected only future elections, without disturbing the election which had been held under the federal-court-approved plan.

Petitioner Sinkfield sought no more than that relief here, and under *Growe v. Emison*, it should not have been denied.

III. The lower courts' application of doctrines like res judicata to the district court's 1992 interim plan is at odds with the basic nature of redistricting cases and the fundamental federalism principles of this court's decision in Growe v. Emison.

In enjoining the appellants from proceeding in state court, the lower courts erroneously characterized the state court case as one seeking to "relitigate" and "overturn" the 1992 federal court plan. See pp. 10a, 14a-16a, 27a.

Growe v. Emison is not about the finality of judgments or about whether state or federal litigants win some "race

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[10] *Travia v. Lomenzo,* 382 U.S. 9 and 382 U.S. 287 (1965) and *Screvane v. Lomenzo,* 382 U.S. 11 (1965).

to the courthouse." It expresses an unambiguous principle of federalism that requires the courts of the United States to give way to State courts undertaking the politically sensitive task of congressional redistricting, intervening only when it is clear that neither the legislative nor judicial branches of State government can adopt a constitutional, precleared plan in time for the next election:

> " . . . a federal court generally need neither abstain . . . nor defer to the state proceedings. . . . In rare circumstances, however, principles of federalism and comity dictate otherwise.
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> * * * * * *
>
> "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." [*Growe v Emison,* 113 S.Ct. at 1080 (emphasis in original)].

Moreover, all the res judicata and anti-relitigation doctrines applied by the lower courts are doctrines designed to lend finality and repose to litigation—in contrast to the very nature of an interim redistricting plan drawn by a federal court, which is designed to be superseded. An interim plan is designed to be superseded because its very existence represents a failure of federalism and a federal court's reluctant assumption of a task which is inherently foreign to federal courts. To be sure, the adjudication of a plan's constitutionality is a traditional function of the federal courts, but taking the next step and actually selecting or drawing a replacement plan is not. Because there are many ways to draw a valid redistricting plan, the task involves making policy choices that belong to the

State, and a federal court taking on this task is inevitably threatened with becoming embroiled in political issues.

Doctrines of repose have never been customary in redistricting litigation.[11] For example, in *Whitcomb v. Chavis*, 403 U.S. 124, 162-63 (1971), this Court upheld the bringing of a second redistricting suit within the same decade. Likewise, in *Parnell v. Rapides Parish School Board*, 563 F.2d 180 (5th Cir. 1977), the former Fifth Circuit specifically rejected a res judicata attack:

> "Res judicata does not bar the plaintiffs' assertion of dilution of their voting strength. Although the same claim, made by a similar class, was rejected by this Court for insufficient proof in *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975), 'it should be remembered that res judicata is a principle of public policy and should be applied so as to give rather than deny justice.' *Dore v. Kleppe*, 522 F.2d 1369, 1374 (5th Cir. 1975). To bind forever class members to a deprivation of their constitutional rights because some class members failed to enter enough evidence to meet their burden of proof is unjust." [563 F.2d at 185.]

In the instant case, the arguments against res judicata are even stronger. In *Whitcomb* and *Parnell*, the question was whether to apply res judicata in its most traditional role—to a determination of liability. Here, however, the

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[11]Neither of the lower courts cited a single case applying res judicata or a similar doctrine to a redistricting case.

attempt is to give res judicata effect to the district court's selection of a remedy, and an interim remedy at that.[12]

When relitigation doctrines are invoked, as they were by the lower courts in this case, the consequence is to strengthen the finality of the prior decision. Yet here the prior decision was the selection of an *interim* plan, which by its very nature was designed *not* to be final.

The net effect was to make an interim plan into a permanent plan, at least as far as state courts are concerned.[13] This is the exact opposite of *Growe v. Emison*'s premise and purpose. If a plan adopted by the federal court (because an election is imminent) is regarded as interim, this Court's entire line of cases stretching back to *Reynolds v. Sims*, 377 U.S. 533 (1964), foresee that citizens will seek a State-drawn plan following that

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[12]While of course a district court has no vested interest in the continuation of its interim redistricting plan, it would be difficult to know that from the court of appeals' statement that "the three-judge district court in this case invested a great deal of time and other resources in the arduous task of reapportioning Alabama's congressional districts." See p. 13a.

Notwithstanding this Court's approval of the State judicial redistricting process, the court of appeals opinion reflects a suspicion of that process, in the use of such terms as "redistricting on demand" and "a system of redistricting at will." See pp. 14a, 17a, 20a.

[13]There is further danger lurking in the opinions below, which suggest that even the federal court should never revisit its interim remedy in light of the Attorney General's section 5 objection. If this Court should decline to disturb the orders below, it should at least make it clear that the district court has a duty to review its own plan for use in future elections in light of the intervening section 5 objection and any evidence that may come before it demonstrating needed revisions in light of section 2 of the Voting Rights Act. *Upham v. Seamon*, 465 U.S. 37 (1982).

election. *Growe v. Emison* expressly assumes that citizens may go to the State judiciary, at least if they gain no relief in the Legislature. Yet, under the lower courts' view of this case, that is precisely what is foreclosed.[14]

By holding that *Growe v. Emison* was inapplicable because in this case the district court's decree antedated the filing of the state court congressional redistricting action, the lower courts invented a groundless distinction that trivialized a powerful decision of this Court. See p. 20a.

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[14]Petitioners read the lower courts' decisions as foreclosing that resort to all citizens, not simply those who were parties to the federal case in which the interim plan was adopted.

Even if that reading is too broad, however, and the only ones foreclosed are those who were parties in the earlier federal case (and those represented by such parties), the use of res judicata-type doctrines like the ones relied on below would still keep federal courts in the redistricting business by announcing that those litigants who have demonstrated their interest in seeking valid reapportionment are precisely those who are disqualified from going to state court.

Conclusion

For the reasons set forth above, petitioner respectfully prays that this Court grant certiorari and reverse the judgment below.

Respectfully submitted,

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Table of Contents of Appendix

Opinions and Orders denying relief on the merits:

1. Order, 11th Circuit, 25 October 1993.....1-a
2. Opinion 11th Circuit, 27 October 1993.....3-a
3. Order of Injunction, US District Court, SD Ala, 13 July 1993..... 22-a
4. Memorandum, Opinion, US District Court, SD Ala, 13 July 1993..... 25-a

Opinions and Orders in earlier phase of this case:

5. Memorandum Opinion, US District Court, SD Ala, 9 March 1992..... 1-b
6. Final Judgment, US District Court, SD Ala, 9 March 1992.....24-b
7. Order, US District Court, SD Ala, 2 April 1992.....26-b
8. Order, U.S. Supreme Court, *Camp v Wesch*, No. 91-1553, 18 May 1992..... 27-b
9. Order, US Supreme Court, *Figures v Hunt*, No. 91-1992, 22 February 1993.....28-b

Orders granting to denying stay:

10. Order, US District Court, SD Ala 21 July 1993 1-c
11. Order, 11th Circuit, 13 August 1993..... 6-c
12. Order, 11th Circuit, 2 November 1993..... 8-c

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6607

DARRYL SINKFIELD, et al.,

Plaintiffs-Appellants

versus

JAMES FOLSOM, et al.

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Alabama

(Filed Oct. 25, 1993)

Before ANDERSON and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge

BY THE COURT:

The judgment of the district court enjoining the state court proceedings in *Sinkfield v. Camp*, Civil Action No. 93-689 (Circuit Court, Montgomery County), is AFFIRMED.

A written opinion setting forth the reasons for this Court's affirmance of the judgment will be entered forthwith.

This court's order staying the district court's order enjoining the state court proceedings entered by a prior panel of this court on August 13, 1993, be and the same is hereby VACATED and the stay of all state court proceedings in this cause is hereby REINSTATED.

Judge Anderson defers decision until the opinion is issued.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6607

D. C. Docket No. 91-0787-BH

PAUL CHARLES WESCH,

Plaintiff-Appellee,

MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER,

Intervenors-Plaintiffs-Appellants,

DARRYL SINKFIELD; QUINTON ROSS; BERNEST BROOKS; RUBIN McKINNON; ANDREW HAYDEN,

Intervenors-Plaintiffs-Appellants,

versus

JAMES E. FOLSOM, JR., Governor, State of Alabama; JAMES H. EVANS, Attorney General; JIM BENNETT, Secretary of State; LIONEL W. NOONAN, Probate Judge; HARRY D'OLIVE, Probate Judge; DEVON WIGGINS, Probate Judge; OTHA LEE BIGGS, Probate Judge; JERRY BOGAN, Probate Judge; CLARENCE WATTERS, Probate Judge; TROM W. TURNER, Probate Judge, all sued in their official or representative capacities only.

Defendants,

ALABAMA DEMOCRATIC PARTY,

Movant.

Appeals from the United States District Court
for the Southern District of Alabama

(October 27, 1993)

Before ANDERSON and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

DUBINA, Circuit Judge:

Appellants, Darryl Sinkfield, et al. ("Sinkfield"), representatives of a class consisting of all African-American citizens of Alabama, appeal the district court's judgment enjoining them from proceeding with congressional redistricting claims filed in the Circuit Court of Montgomery County, Alabama. We affirm.

I. PROCEDURAL HISTORY

This litigation began on September 23, 1991, when Appellee Paul C. Wesch ("Wesch") brought suit in the United States District Court for the Southern District of Alabama against the Governor of Alabama and other state officials. Wesch alleged that Alabama's congressional districts were unconstitutionally malapportioned and he sought an injunction prohibiting elections under the existing districts and establishing a remedial redistricting plan. Pursuant to 28 U.S.C. § 2284, a three-judge panel was convened to hear the case.

On December 4, 1991, Appellants Michael Figures and Joseph Mitchell ("Figures") moved to intervene on behalf of themselves and all qualified electors who were African-American residents of Alabama ("African-American Intervenors"). Figures's complaint in intervention

alleged that Alabama's existing congressional districts violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because they did not "allow for the election of an African-American to Congress from the State of Alabama." (R-2, Doc. 39). The district court granted Figures's motion to intervene and certified the intervenors as a class represented by Figures.

At trial the parties, including the African-American Intervenors, stipulated that the remedial redistricting plan should include a single-member significant majority (65% or more) African-American congressional district. *Wesch v. Hunt*, 785 F.Supp. 1491, 1493-94, 1498 (S.D.Ala. 1992). The parties submitted six proposed redistricting plans to the district court. One of the plans, the Hilliard Plan, contained two majority African-American districts. Neither of those districts, however, would have achieved a 65% or greater African-American majority as called for by the stipulation. "Although [the Hilliard Plan] was submitted by the [African-American] intervenors, they took the position that [it] probably provided obstacles of sufficient nature to cast doubt on their opportunity to elect candidates of their choice in these districts." *Id.* at 1496.

On March 9, 1992, the district court entered its final judgment. The court (a) declared Alabama's existing congressional districts unconstitutional, (b) enjoined the holding of any further elections under the existing districts, and (c) ordered that congressional elections be held according to the 1992 Alabama Redistricting Plan, both in 1992 and in later years, until "the Alabama Legislature

duly enacts a redistricting plan and has the same precleared in accordance with federal law in time for congressional elections to proceed without delay under then applicable state and federal law." *Id.* at 1501-02. The 1992 Alabama Redistricting Plan adopted by the court, which was essentially the plan proposed by Wesch, created one single-member significant majority African-American district with an African-American population of 67.53%. The district court stated that because the parties agreed in their stipulation to the creation of a single-member significant majority African-American district, it did not need to decide whether Section 2 of the Voting Rights Act required the creation of such a district in Alabama at that time. *Id.* at 1499.

At the time of the district court's final judgment, the Alabama Legislature had enacted a congressional redistricting plan that had not yet been precleared by the Attorney General pursuant to Section 5 of the Voting Rights Act. The legislature's plan also contained one majority African-American district. On March 27, 1992, the Attorney General refused to preclear the legislature's plan because it failed to explain why a second majority African-American district was not created. The African-American Intervenors then filed a Rule 60(b) motion requesting that the district court modify its plan to include a second majority African-American district. The district court denied the motion. On appeal, the Supreme Court summarily affirmed the district court's refusal to modify its plan. *Figures v. Hunt*, ___ U.S. ___, 113 S.Ct.

1233, 122 L.Ed.2d 640 (1993).[1] In the meantime, the 1992 congressional elections were held according to the district court's original 1992 Alabama Redistricting Plan. Subsequently, Sinkfield filed a class action suit seeking legislative redistricting in the Circuit Court of Montgomery County, Alabama[2] on behalf of himself and as the representative of a class composed of all African-American citizens of Alabama ("the Sinkfield class"), the same class represented by Figures in *Wesch v. Hunt*. On February 23, 1993, the Supreme Court decided *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075 (1993). On April 5, 1993, the Sinkfield class amended its complaint to include Congressional redistricting claims. The Sinkfield class's amended complaint asserted that the Alabama Legislature's failure to redraw Alabama's congressional districts deprived it of certain rights guaranteed under the Alabama and United States Constitutions and Section 2 of the Voting Rights Act[3] and requested that the state court implement

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[1] In a previous appeal, in which the Alabama Secretary of State argued that the district court erred in not adopting the plan enacted by the Alabama Legislature, the Supreme Court also summarily affirmed the district court. *Camp v. Wesch*, ___ U.S. ___, 112 S.Ct. 1926, 118 L.Ed.2d 525 (1992).

[2] *Sinkfield v. Camp*, Civil Action No. 93-689 (Cir. Ct. Montgomery County).

[3] Specifically, the Sinkfield class claimed that the Alabama Legislature's failure to redraw Alabama's congressional districts deprived them of (a) their rights to equal protection of the laws guaranteed by Section 1 of the Constitution of Alabama, (b) their one-person-one vote rights not to have their votes diluted or underweighted on account of their place of residence as guaranteed by the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 2 of the United States Constitution, (c) their rights not to have their federally protected right

a redistricting plan of its own. The apparent basis for these claims is that Alabama has only one majority African-American congressional district. The Sinkfield class, maintaining that *Growe v. Emison* declared state courts to be the virtual equivalent of state legislatures in redistricting matters, urged the state court to read the three-judge district court's injunction in *Wesch* as "encouraging congressional redistricting by the Government of Alabama, that is, by both the legislative and judicial branches."

In effect, the Sinkfield class asked that the 1992 Alabama Redistricting Plan approved by the federal panel by replaced by a plan approved by the *Alabama state court.* Wesch then moved the district court to stay the state court proceedings, to the extent that they related to congressional redistricting, pursuant to the All-Writs Act, 28 U.S.C. § 1651, and the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, that specifically empower a federal court to enjoin state court proceedings in aid of its jurisdiction or to protect or effectuate its judgments. On July 13, 1993, the district court granted Wesch's motion and enjoined any further proceedings in the state court case with regard to congressional redistricting. The district court explained that it was simply enforcing the order of the three-judge district court "enjoin[ing] the conduct of any congressional election after 1992 held pursuant to a plan other than the 1992 Alabama Redistricting Plan

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to vote denied or abridged on the basis of their race or ethnicity as guaranteed by the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, and (d) their rights not to have their electoral strength diluted or minimized as guaranteed by Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973.

adopted by this court except in the event 'the *Alabama Legislature* duly enacts a redistricting plan and has the same precleared in accordance with federal law in time for congressional elections.' " *Wesch v. Hunt*, ___ F.Supp. ___ (1993) (emphasis added). The district court rejected the argument that *Growe v. Emison* required it to allow the parties to proceed with their congressional redistricting suit in state court, stating that

> *Growe* does not stand for the proposition that a State court is a co-equal branch of government with respect to overturning a districting plan enacted by a federal court and affirmed on appeal by the United States Supreme Court prior to any effort by such state court to address any issue relating to reapportionment and redistricting. By contrast, *Growe* stands only for the proposition that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."

Wesch v. Hunt, ___ F.Supp. ___ (1993), *quoting Growe v. Emison*, ___ U.S. ___, 113 S.Ct. at 1080. The Sinkfield Class timely appealed to this court. On August 13, 1993, this court granted a stay of the district court's injunction pending this appeal.

II. STANDARD OF REVIEW

The grant of an injunction is reviewed for abuse of discretion. *Centel Cable Television Co. v. Thos. J. White Dev. Corp.*, 902 F.2d 905, 910 (11th Cir. 1990); *United States v.*

Alabama, 791 F.2d 1450, 1458 (11th Cir. 1986); *United States v. Board of Ed.*, 332 F.2d 40, 45-46 (5th Cir. 1964).[4] However, if the trial court misapplies the law we will review and correct the error without deference to that court's determination. *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir. 1991); *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989).

III. DISCUSSION

The question of whether to stay proceedings in a state court is never one to be taken lightly, as it impinges on the very delicate balance struck between the federal and state judicial systems. Although district courts have been warned to be hesitant in enjoining state litigation, *see Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), the decision of whether to take such action remains one of discretion for the district court. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983) ("within the limits of that discretion, a district court in a given case might go either way and not be reversed.").

The district court here based its injunction on the long recognized power of courts of equity to effectuate their decrees by injunctions or writs of assistance and thereby avoid relitigation of questions once settled

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[4] The decisions of the United States Court of Appeals for the Fifth Circuit rendered by that court prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

between the same parties. *See Root v. Woolworth*, 150 U.S. 401, 411-412 (1893); *Hamilton v. Nakai*, 453 F.2d 152, (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972). This equitable power has been codified by Congress in the All-Writs Act, 28 U.S.C. § 1651.[5] *Hamilton*, 453 F.2d at 157. The All-Writs Act gives federal courts the power to issue injunctions in aid of their jurisdiction. In addition, courts hold that despite its express language referring to "aid of . . . jurisdiction," the All-Writs Act also empowers federal courts to issue injunctions to protect or effectuate their judgments. *See Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067, 1069 (11th Cir. 1993); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971); *Ward v. Pennsylvania New York Cent. Transp. Co.*, 456 F.2d 1046, 1048 (2nd Cir. 1972); *Olin Corp. v. Insurance Co. of North America*, 807 F.Supp. 1143, 1152 (S.D.N.Y. 1992).

In contrast to the broad powers granted to federal courts by the All-Writs Act, the Anti-Injunction Act, 28 U.S.C. § 2283[6] prohibits federal courts from enjoining state court proceedings with three limited exceptions. The

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[5] Section 1651(a) provides:
The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[6] Section 2283 provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

two exceptions relevant to this case allow a federal court to enjoin a state court proceeding: (1) when necessary in aid of its jurisdiction, and (2) to protect or effectuate its judgments. Because we are persuaded that the district court's injunction was necessary both in aid of its jurisdiction and to protect and effectuate its prior judgment, we hold that the district court did not abuse its discretion by enjoining the proceedings in the Montgomery County Circuit Court.

A. In Aid of Jurisdiction

The United States Supreme Court recognizes that a federal court injunction of state court proceedings is necessary in aid of jurisdiction when necessary "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970). When a court issues an injunction, it automatically retains jurisdiction to enforce it. *See, e.g. Suntex Dairy v. Bergland,* 591 F.2d 1063, 1068 (1979); *Plaquemines Parish Comm. Council v. United States,* 416 F.2d 952, 954 (5th Cir. 1969) ("Generally, a district court retains jurisdiction to enforce its prior orders . . . "); *United States v. Fisher,* 864, F.2d 434, 436 (7th Cir. 1988); *McCall-Bey v. Franzen,* 777 F.2d 1178, 1183 (7th Cir. 1985); *cf.* 11 Wright & Miller, Federal Practice & Procedure § 2961, at p. 599 (1973). In *Battle v. Liberty Nat'l Life Ins. Co.,* 877 F.2d 877, 880 (11th Cir. 1989), we held that a federal district court which entered a final judgment in a complex antitrust class action suit could enjoin in aid of

its jurisdiction a later state court suit in which class members brought substantially similar claims. In reaching our decision, we held that the "necessary in aid of jurisdiction" exception is applicable both after the entry of a final judgment in federal court and to proceedings that are not *in rem*. *Id.* at 881. Moreover, we reasoned that a lengthy and complicated class action suit is the virtual equivalent of a *res* to be administered. *Id.* at 882.

The three-judge district court in the original *Wesch* litigation expressly ordered that its 1992 Alabama Redistricting Plan remain in effect until the *Alabama Legislature* replaced it with a valid plan. In enjoining the state court suit, the district court was merely exercising its continuing jurisdiction to enforce the order of the three-judge district court in *Wesch*. Like the district court in *Battle*, the three-judge district court in this case invested a great deal of time and other resources in the arduous task of reapportioning Alabama's congressional districts. In addition, both *Battle* and the *Wesch* case involved class actions. Like the state court plaintiffs in *Battle*, the Sinkfield class brought suit in state court asserting claims substantially similar to those already decided by the final judgment of the three-judge district court in *Wesch*. The Sinkfield class does not claim that the 1992 Alabama Redistricting Plan adopted by the three-judge district court in *Wesch* is in any way defective. Rather they erroneously[7] assert a right to a congressional redistricting plan adopted by a state rather than a federal court and seek to oust and replace the federal court plan. They claim that right exists although the federal court plan has been validated on

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[7] See discussion of *Growe v. Emison infra*.

appeal as constitutional, and although the plan they seek in state court has been considered and rejected in the federal court and the rejection validated on appeal. One election has occurred since the federal plan was adopted, but the Sinkfield class contended at oral argument in this appeal that their right to oust the federal plan and replace it with their previously-rejected plan would exist even if no election had occurred. To allow a system of redistricting at will would render all federal court redistricting plans, regardless of their validity, susceptible to immediate replacement by state court redistricting plans without any showing of change in circumstance or other reasons, and would effectively strip all federal courts of the ability to meaningfully redistrict. Thus the district court was justified in enjoining the state court suit in aid of its jurisdiction and did not abuse its discretion.

B. To Protect or Effectuate Judgments

The "protect or effectuate its judgments" exception to the Anti-Injunction Act, also known as the "relitigation exception," is essentially a res judicata concept designed to prevent issues that have already been tried in federal court from being relitigated in state court. *Woods Exploration & Prod. Co., Inc. v. Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). Because of the sensitive nature of federal interference with state court litigation, district courts require that parties requesting an injunction make a strong and unequivocal showing of relitigation. *See G.M. Brod & Co., Inc. v. Adler,* 845 F.2d 899, 900 (11th Cir. 1988); *Delta Air*

Lines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 582, 585-86 (11th Cir. 1983).

Federal courts apply the law of the state in which they sit with respect to the doctrine of res judicata. Under Alabama law, the essential elements of res judicata are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990). If all these elements are met, any claim that was or could have been adjudicated in the previous action is precluded. *Id.* It is well-settled that "the principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action." *Id.* at 1561. Res judicata applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts. *Id.* at 1561.

In this case all four of the elements of res judicata are met. The three-judge district court in *Wesch*, a court of competent jurisdiction, issued a final judgment on the merits. The state court plaintiffs, the Sinkfield class, were members of the class of African-American citizens of Alabama represented by Figures in *Wesch* and thus were parties to that suit. Finally, both the federal suit in *Wesch* and the state suit in *Sinkfield* involve the same cause of action. In *Wesch* the plaintiffs attacked the then existing congressional districting scheme on the grounds that it violated the United States Constitution and section 2 of the Voting Rights Act. The three-judge district court in *Wesch* adopted a constitutional congressional redistricting plan that was twice upheld on appeal to the United States

Supreme Court. In one of those appeals, the Supreme Court summarily affirmed the order of the district court denying the African-American Intervenors' post-judgment, Rule 60(b) motion that the district court modify its plan to include a second majority African-American district.

The thrust of the Sinkfield class's state court complaint is that they have a right to a second majority African-American district and to a congressional districting plan adopted by a state court rather than one adopted by a federal court. The federal court judgment in *Wesch* is clearly res judicata as to both of these claims. The question of the appropriate number of majority African-American districts was aired both in the original proceedings before the three-judge district court and in the subsequent Rule 60(b) motion, which the district court denied and which denial the Supreme Court affirmed. The Sinkfield class's claimed right to a state court plan arises from the same nucleus of operative facts as the claims adjudicated by the federal court in *Wesch*. In short, both the *Wesch* case and the *Sinkfield* case present the same cause of action.

The Sinkfield class contends that res judicata has only a limited application in congressional redistricting cases. While the question of how long, and under what circumstances, a valid federal court districting plan would be res judicata barring state courts from adopting a different plan is a thorny one, we need not address that question here because the Sinkfield class has failed to demonstrate any reason why the federal court judgment in *Wesch* would not be res judicata for purposes of this case.

Apart from the strict limitations imposed by res judicata, there are policies that militate against redistricting at will. The Supreme Court has made it clear that the policy interest of promoting stability in elections dictates against redistricting too frequently.

> Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonable current scheme of legislative representation.

Reynolds v. Sims, 377 U.S. 533, 583-84 (1964). In addition, courts are reluctant to redistrict shortly before a new census, which might require yet another reapportionment. *See White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2916 (1991); *Maryland Citizens for a Representative Gen'l Assembly v. Governor of Maryland*, 429 F.2d 606, 610 (4th Cir. 1970). *Reynolds* indicates that certain shifts in population alone would not require a court to readjudicate the constitutionality of a

reapportionment plan that was judicially determined to have been constitutional when adopted. 377 U.S. at 583-84. In any event, the district court in *Wesch* used 1990 census data, and the Sinkfield class has not alleged any shifts in population or any other change in circumstances since the adoption of the 1992 Alabama Redistricting Plan by the federal district court in *Wesch*. Some courts have held that an intervening change in the law, however, would justify readjudication of the constitutionality of a reapportionment plan, judicially determined to have been constitutional when adopted. *See Whitcomb v. Chavis*, 403 U.S. 124, 162-63 (1971); *Parnell v. Rapides Parish Sch. Bd.*, 563 F.2d 180, 185 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

The Sinkfield class asserts that the Supreme Court's recent decision in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075 (1993), constitutes an intervening change in the law negating the res judicata effect of the prior federal court judgment in *Wesch*. Specifically, the Sinkfield class argues that *Growe* declared state courts to be the equivalent of state legislatures in redistricting matters and that this court must therefore read the *Wesch* order as allowing either the Alabama state legislature or the Alabama state courts to adopt a valid redistricting plan supplanting the federal court's 1992 Alabama Redistricting Plan. We disagree.

Growe did not change the law. It merely reaffirmed the extant principle that federal judges should "defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Id.* at

1080 (emphasis in original). In *Growe*, original redistricting suits were simultaneously pending in both federal and state courts. Neither court had previously adopted a valid redistricting plan or determined the validity of the existing redistricting plan since the taking of the 1990 census. Although the state court was ready and able to adopt a redistricting plan in time for the upcoming elections, the federal district court in *Growe* enjoined the state court proceedings. On appeal, the Supreme Court held that the district court should have deferred to the pending state proceedings.

Growe requires deferral not abstention. *Id.* at 1082. Moreover, *Growe* does not empower state courts to preempt federal court judgments. Once it is apparent that a state court, through no fault of the district court, will not develop a redistricting plan in time for an upcoming election, *Growe* authorizes a federal district court to go ahead and develop a redistricting plan. *See id.*

In contrast to the facts of *Growe*, at no time prior to the entry of final judgment by the federal district court was a similar redistricting suit initiated in any Alabama state court. In the absence of any state suit to which it should defer, the federal district court properly undertook the complex task of redistricting. Once a federal court enters a final judgment adopting a valid redistricting plan, nothing in *Growe* vitiates the res judicata effect of that judgment.[8]

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[8] We note one additional respect in which this case is different from *Growe*. In *Growe* both the state and federal courts had undisputed jurisdiction to adopt a redistricting plan. In this case there is some question as to whether the Alabama state courts

In *Growe* there was an unseemly race for judgment between state and federal courts, and the federal court had ordered the state court out of the race. There is no such race in this case. The Sinkfield class has been to the federal courthouse and has lost. That decision was summarily affirmed by the Supreme Court. The Sinkfield class's effort to modify the federal court order under Rule 60(b) was likewise rejected by the district court and summarily affirmed by the Supreme Court. Now, with no showing of any defect in the existent redistricting plan or change in circumstances, or even such expiration of time as arguably might cast doubt on the current correctness of the plan, and in violation of the stipulation in which they joined in the federal case, the Sinkfield class seeks in state court to oust the existent plan and to replace it with a plan that follows their repeatedly-rejected proposals. *Growe* does not authorize this redistricting on demand, done without reasons.

In its final judgment the three-judge district court in *Wesch* ordered that its 1992 Alabama Redistricting Plan remain in effect until the Alabama *Legislature* enacts a valid plan. The Sinkfield class's request that the state court now adopt its own congressional redistricting plan is contrary to the clear language of the district court's order. The district court's injunction of the state court

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have the power under Alabama law to adopt a redistricting plan. We note that a three-judge federal district court in the case of *Brooks v. McKinnon*, No. 92-T-364-N (M.D.Ala. 1993), recently certified this precise question to the Alabama Supreme Court. To the extent that the Alabama state courts may lack jurisdiction to decide redistricting cases, the district court's injunction in this case is further justified.

proceedings was thus necessary to protect and effectuate its judgment and was not an abuse of its discretion.

IV. CONCLUSION

The judgment of the district court enjoining any further proceedings in the case of *Sinkfield v. Camp*, currently pending in the Circuit Court of Montgomery County, Alabama, is necessary both in aid of its jurisdiction and to effectuate its prior final judgment and is not an abuse of the district court's discretion. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

PAUL CHARLES WESCH, Plaintiff, MICHAEL FIGURES, et al., Intervenor-Plaintiffs, v. GUY HUNT, et al., Defendants.	)	CIVIL ACTION NO. 91-0787

ORDER OF INJUNCTION

It is ORDERED, ADJUDGED and DECREED, as follows:

The defendants, James Folsom as successor in office to Guy Hunt and James Bennett as successor in office to Billy Joe Camp, the intervenor-plaintiffs, Michael Figures and Joseph Mitchell, intervenor-plaintiff class members Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden, each individually, and their successors, agents, employees, attorneys, and those persons otherwise acting in concert or participation with them who receive actual notice of this order, are ENJOINED, pending further order of this Court, from:

(a) failing to immediately dismiss those claims in *Sinkfield v. Camp*, Civil Action No. 93-689 (Cir. Ct. Montgomery County), which relate to congressional redistricting;

(b) prosecuting in any manner, other than the aforementioned dismissal directed in paragraph (a) above, in *Sinkfield v. Camp*, Civil Action No. 93-689 (Cir. Ct. Montgomery County), claims which relate to congressional redistricting;

(c) filing or prosecuting in the State courts of Alabama any claim which seeks to alter the congressional districting plan adopted by the three-judge court in this action, or any other claim seeking relief concerning congressional redistricting in the State of Alabama.

Any individual who is subject to this order but fails to abide by its precepts shall be held in contempt by this Court.

It is FURTHER ORDERED that the United States Marshal shall **immediately** cause a copy of this injunction to be personally served on the following parties at the addresses provided or wherever such parties can be located, and make due return thereof:

1. James Folsom, Governor of Alabama, State House, 11 South Union Street, Montgomery, Alabama 36130.
2. James Bennett, Alabama Secretary of State, State House, 11 South Union Street, Montgomery, Alabama 36130.
3. Michael Figures, 2054 Clemente Court, Mobile, Alabama 36617.
4. Joseph Mitchell, 465 Dexter Avenue, Mobile, Alabama 36604.
5. Darryl Sinkfield, 5600 Carmichael Road, Apartment 2009, Montgomery, Alabama 36117.

6. Quinton Ross, 2938 Susan Drive, Montgomery, Alabama 36116.

7. Bernest Brooks, 104 Cook Street, Enterprise, Alabama, 36330.

8. Rubin McKinnon, Route 4 Box 130-N, Elba, Alabama 36323.

9. Andrew Hayden, Post Office Box 514, Uniontown, Alabama 36786.

Finally, it is **ORDERED** that the Clerk of this Court mail a copy of this injunction to each party and counsel of record by registered mail, return receipt requested.

DONE this 13th day of July, 1993.

/s/ W. B. Hand
SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL CHARLES WESCH, Plaintiff,	)	
MICHAEL FIGURES, et al., Intervenor-Plaintiffs,	)	CIVIL ACTION NO. 91-0787
v.	)	
GUY HUNT, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

This action came on for hearing this day on motion of Plaintiff Wesch to stay the proceedings in *Sinkfield v. Camp*, Civil Action No. 93-689 (Cir. Ct. Montgomery County), to the extent such proceedings involve claims related to congressional redistricting.[1] Upon consideration of plaintiff's motion, all filings in opposition thereto, the arguments of counsel and portions of the file relevant thereto, the Court concludes that plaintiff Wesch's motion is due to be granted.

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[1] James Folsom, as successor in office to Guy Hunt, James Bennett, as successor in office to Billy Joe Camp, the intervenor-plaintiffs Michael Figures and Joseph Mitchell, intervenor-plaintiff class members Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden, were each given notice of plaintiff's motion, the schedule hearing and appeared by counsel. James Folsom and James Bennett are parties pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

Contrary to the contentions of those parties opposed to plaintiff's motion, the stay sought in this action is not an injunction pursuant to 28 U.S.C. § 2284(b)(3) but, rather a stay to enforce the injunction previously entered by the three-judge court in this action pursuant to 28 U.S.C. § 2284(b)(3), to-wit the Final Judgment entered on March 9, 1992, and affirmed by the United States Supreme Court. Consequently, this matter may be addressed by the undersigned as the primary judge to whom this case is assigned. *See e.g., Bond v. White,* 508 F.2d 1397, 1401 (5th Cir. 1975) ("The three-judge district court . . . properly exercised its discretion when it remanded the case to the district court for enforcement of its decree"), binding on this Court by virtue of *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). *See also, Hamilton v. Nakai,* 453 F.2d 152, 161 (9th Cir.), *cert. denied,* 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972), ("this proceeding does not seek a [§ 2284] judgment; it seeks enforcement of a judgment already entered"). *See also, Mader v. Crowell,* 506 F.Supp. 484, 485 (M.D. Tenn. 1981) ("[A]s a general proposition, once the three-judge court has entered its judgment, the single judge before whom the action was initially filed may take subsequent actions necessary to enforce the judgment").

With respect to the Court's authority in general, the Supreme Court long ago recognized that "[t]he jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid relitigation of questions once settled between the same parties, is well settled." *Hamilton, supra* 453 F.2d at 157, *quoting, Root v. Woolworth,* 150 U.S. 401, 411-412, 14 S.Ct. 136, 139, 37 L.Ed. 1123 (1893). Here, as in *Root* and

Hamilton, "the power of the court to issue the order requiring compliance or to enforce the judgment by a writ of assistance follows from the principle that a court's power to afford a remedy must be coextensive with its jurisdiction over the subject matter. *Hamilton*, 453 F.2d at 157. *See also, Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 91 (5th Cir. 1977) ("[N]othing would be as productive of friction between the state and federal courts as to permit a state court to interpret and perhaps to upset such a judgment of a federal court").

Finally, the Court concludes that *Growe v. Emison*, 61 U.S.L.W. 4163 (February 23, 1992), does not mandate that this Court, having entered a final judgment which enjoined the conduct of any congressional election after 1992 held pursuant to a plan other than the 1992 Alabama Redistricting Plan adopted by this court except in the event "the Alabama Legislature duly enacts a redistricting plan and has the same precleared in accordance with federal law in time for congressional elections," now vacate its judgment for the sole purpose of allowing the Montgomery Circuit Court in *Sinkfield* to address the same issue heretofore litigated in this court by the duly designated representatives of the *Sinkfield* plaintiffs. *Growe* does not stand for the proposition that a State court is a co-equal branch of government with respect to overturning a districting plan enacted by a federal court and affirmed on appeal by the United States Supreme Court prior to any effort by such state court to address any issue relating to reapportionment and redistricting. By contrast, *Growe* stands only for the proposition that "[i]n the reapportionment context, the Court has required

federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Id.* at 4165 (emphasis added).

It is therefore ORDERED that the motion filed by plaintiff Wesch to stay the State court proceedings in *Sinkfield* be and is hereby GRANTED to the extent the Court orders that an injunction issue forthwith in the form appended hereto.

DONE this 13th day of July, 1993.

/s/ W. B. Hand
SENIOR DISTRICT JUDGE

PAUL CHARLES WESCH, Plaintiff, MICHAEL FIGURES, et al., Intervenor-Plaintiffs, v. GUY HUNT, et al., Defendants.

CIVIL ACTION NO. 91-0787
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

785 F. Supp. 1491; 1992 U.S. Dist. LEXIS 17270

March 9, 1992, Filed

MEMORANDUM OPINION

Before COX, Circuit Judge, HAND, Senior District Judge, and ALBRITTON, District Judge.

BY THE COURT

INTRODUCTION

On September 23, 1991, Plaintiff Paul Charles Wesch brought this action seeking declaratory and injunctive relief against the Governor of Alabama, as well as other state officials, contending, inter alia, that the present State law defining congressional districts in the State of Alabama violates Art. I, § 2 of the Constitution. Based on 1990 census data, Wesch specifically alleges that if the 1992 congressional elections were to be held under the present districting plan, it would violate his right to the constitutionally mandated "one-person, one-vote" scheme of representation.

Pursuant to 28 U.S.C. § 2284(a), this three-judge court was convened. On December 9, 1991, Michael Figures and others, who assert a claim under the Voting Rights Act, 42 U.S.C. § 1973 et seq., were granted leave to intervene. A two day trial was held.

Having considered the evidence and the post-trial submissions of

the parties, the court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Plaintiff Paul Charles Wesch is a citizen of the United States and is a resident and registered voter in the First Congressional District of Alabama as presently configured.

2. The Intervenor-Plaintiffs, Michael Figures and others, are African-American citizens of the United States and the State of Alabama. They have been allowed to intervene in this litigation both on their own behalf and on behalf of all African-American citizens of the State of Alabama.

3. It was agreed by all parties, including the Plaintiff-Intervenors, that the complaint of intervention would proceed on an allegation that § 2 of the Voting Rights Act has been violated, insofar as the class represented by the intervenors had been denied meaningful access to the voting process that would allow them to elect candidates of their choice.

4. The court notes that the original complaint was filed in September, a fact known to the Plaintiff-Intervenors who chose not to intervene until December 4, 1991. Therefore, the Plaintiff-Intervenors were permitted to intervene only after they agreed to comply with all procedures and deadlines in place.

5. The Defendant Guy Hunt is the Governor of Alabama. The Defendant Billy Joe Camp is the Secretary of State of Alabama. The Defendants Lionel W. Noonan, Harry D'Olive, Devon Wiggins, Otha Lee Biggs, Jerry Bogan, Clarence Watters, and Tom W. Turner are the Probate Judges of the seven counties which presently comprise the First Congressional District of Alabama. All Defendants are sued both in their individual and official capacities. All Defendants have significant duties in the administration of congressional elections in Alabama.

6. This court advised the parties of its intent to employ Professor Harold W. Stanley as the court's expert to assist in considering any and all plans for redistricting that might be submitted, and to advise the court on the statistical issues in regard to any possible redistricting. The court extended to the parties the opportunity to state if there were any objections to the court's selection of this expert. No objections were filed. After the trial, the parties were also given the opportunity to object to the statistical information relied on by Professor Stanley, the same information underlying this order. No objections were filed.

7. In 1981, the Alabama Legislature enacted the current version of Ala. Code § 17-20-1 (1987), which divided the state into seven congressional districts. During 1990, the Bureau of the Census of the United States Department of Commerce conducted a census of the United States, including the State of Alabama, pursuant to constitutional authority. On January 16, 1991, the Cierk of the United States House of Representatives notified Governor Hunt that Alabama would retain seven seats in the House of Representatives following the 1990 census. (Statement of Agreed Facts and Exhibit A thereto.)

8. According to the 1990 census, Alabama's total population is 4,040,587 persons. In order to achieve exact population equality among each of Alabama's seven congressional districts, the ideal population of each district would be 577,227 persons. (Statement of Agreed Facts and Exhibit B thereto.)

9. Alabama's most populous congressional district is District 5, which has 603,726 persons. Accordingly, District 5 varies from the "ideal" population by 26,499 persons, or 4.59%. Alabama's least populous congressional district is District 6, which has 532,748 persons. Accordingly, District 6 varies from the "ideal" population by 44,479 persons, or 7.71%. The difference between the populations of the most populous and least populous districts is 70,978 persons, which constitutes a relative overall variance from the ideal population of 12.3%. (Statement of Agreed Facts,

Exhibit B.)

10. African-Americans do not constitute a majority in any of Alabama's existing congressional districts. (Statement of Agreed Facts, Exhibit C.) However, according to the 1990 census data, the African-American population in Alabama is sufficiently compact and contiguous to permit the creation of a congressional district in which 65% or more of the residents are African-Americans. The parties agree that such a district should be created. (Supplemental Stipulation filed January 3, 1992.)

11. On February 8, 1991, the Alabama Legislature received the 1990 census data on magnetic tape from the Bureau of Census, and this information was loaded, as received, into the computer system maintained by the Alabama Legislature's Permanent Joint Legislative Committee on Reapportionment ("Reapportionment Committee"). The population data in the Reapportionment Committee's computer data base is the official 1990 census data compiled and released by the Bureau of the Census and is accurate and reliable information for redistricting purposes. (Statement of Agreed Facts.) On July IS, 1991, the Secretary of Commerce advised that there would be no adjustment to the 1990 census figures as originally transmitted to the Alabama Legislature.

12. The total population of each existing congressional district is reflected in Appendix A to this opinion. The total population of each existing congressional district by race is reflected in Appendix B; the total population by race of each of Alabama's 67 counties is reflected in Appendix C; and the voting age population by race of each of the 67 counties is reflected in Appendix D. The names, dates when first elected, and home addresses of Alabama's incumbent congressmen are reflected in Appendix E.

13. On April 2, 1991, the Reapportionment Committee adopted a set of guidelines for redistricting. (Plaintiff's Exhibit 1; deposition of Marilyn Terry, pp. 24-25.) The Guidelines set forth a fair set of criteria for congressional redistricting. In addition to

mandating compliance with population equality or the "one-person, one-vote" rule and the requirements of the Voting Rights Act, these guidelines included the following criteria:

> 3. All legislative and congressional districts will be composed of contiguous and reasonably compact geography.
>
> 4. Where possible, legislative and congressional districts should attempt to preserve communities of interest, including without limitation municipalities and concentrations of blacks and other ethnic minorities, where such efforts do not violate the other stated criteria.
>
> 5. Counties should be used as district building blocks where possible, and to the extent consistent with other aspects of these criteria.
>
> a. Where county lines cannot be maintained, district boundaries should follow as closely as practicable the local voting precinct boundary lines in order to minimize voter confusion and cost of election administration.
>
> b. Where voting precinct boundary lines cannot be followed and also meet the geographic guidelines as stated in this section, district lines must follow census block geography in order to maintain the integrity of the statistical analysis.
>
> 6. Efforts will be made to preserve cores of existing districts where such efforts are consistent with and do not violate the other criteria stated herein.

14. The Alabama Legislature adjourned its 1991 regular session on July 29, 1991, without enacting a congressional redistricting plan. (Statement of Agreed Facts, Paragraph 13.) It was argued that the Legislature might delay the primaries for congressional elections, allowing it time to adopt and have precleared a constitutional redistricting plan. If that were done, two primaries

would have to be held, entailing added cost to the taxpayers.

15. By statute, Alabama's congressional primaries will be held June 2, 1992. The qualifying deadline for candidates is sixty days prior to the primary, or April 3, 1992.[1] In order for a legislatively-enacted congressional redistricting plan to receive the "preclearance" from the Justice Department required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in time for the April 3 qualifying deadline, such a plan should have been submitted to the Justice Department no later than February 3, 1992.

16. Under Alabama law, the calling of special sessions of the Legislature is a discretionary call on the part of the Governor. Ala. Const. Art. V, § 122. The Governor's answer filed on October 29, 1991, indicated that the Governor did not plan to call a special session of the Legislature for the purposes of redistricting.

17. At the time this case was filed, this court considered it highly unlikely that the legislative process could produce a congressional redistricting plan and have it precleared in time for the 1992 congressional primaries to be held as scheduled. Nothing was presented to this court to indicate that the Legislature would convene for the purpose of adopting a plan of redistricting in time to be precleared for these elections. Nothing was presented to indicate that even if a special session was called for the purpose of considering redistricting, that a successful effort would follow, or that even if the Legislature was allowed to consider the matter after the regular term commenced on February 4, 1992, that a plan would be forthcoming, and if forthcoming, there would be time to have such plan precleared. The court considered this case on a fast track in light of the impending primary. All parties participating in this case were put on notice of this fact.

18. Consequently, the court finds that the only means by which Alabama's 1992 congressional primaries may be held in a timely

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1. Ala. Code §§ 17-16-6 to -11 (Supp. 1990).

manner (other than under the current districting scheme which, for reasons enumerated in the Conclusions of Law, the court rejects) is pursuant to an interim redistricting plan ordered by this court.

19. The parties have submitted six proposed redistricting plans to the court for its consideration: (1) the "Reed Plan," Plaintiff's Exhibits 3 and 7; (2) the "Sam Pierce Zero Plan," Plaintiff's Exhibits 2 and 6 (hereafter the "Pierce Plan"); (3) the "Hilliard Plan," Intervenors' Exhibits 3 and 3A; (4) the "Unity Plan," Intervenors' Exhibits 1 and 1A; (5) the "Modified Unity Plan," Intervenors' Exhibits 2 and 2A; and (6) the "CD25 Plan," Intervenors' Exhibits 4 and 4A.

20. Of the six plans submitted, only the Reed Plan was considered in its final form by the Reapportionment Committee. The Pierce Plan, however, is a modification of a plan called the "Larry Dixon Plan" which was considered by the Reapportionment Committee. The Pierce Plan modified the Larry Dixon Plan to some extent, but the basic format is similar. The Legislature of the State of Alabama created an Interim Task Force on Reapportionment by Act #87-356. By Act #90-388 that task force became the staff to the Permanent Committee on Reapportionment of the Alabama Legislature. The task force scheduled a series of public hearings in regard to redistricting matters, and under the instructions given to the Reapportionment Committee, as set forth in the Guidelines for Legislative and Congressional Redistricting, the Reapportionment Committee meetings and public hearings were open to the public and all plans presented to the Reapportionment Committee were to be made available to the public for its input. These public meetings were held in accordance with the schedule outlined in the appendix to the motion to dissolve filed by Evans (Tab #14). Among those plans considered by the Reapportionment Committee, and one that apparently was to be presented to the Legislature, was the Larry Dixon Plan.

The Reapportionment Committee conducting the hearings was made up both African-Americans and Whites. public input to the

Reapportionment Committee in regard to the respective plans was from both African-Americans and Whites.

21. Neither The Pierce Plan nor the Larry Dixon Plan was adopted by the Alabama Legislature.

22. We take judicial notice of the fact that the Legislature has since adopted a plan which substantially differs from any plan that was submitted to this court. We also note the fact that the adopted Plan has neither been precleared by the Justice Department nor approved by the District Court for the District of Columbia.

23. Only two of the plans submitted -- the Pierce Plan and the Reed Plan -- achieve population equality among the districts. Under the Pierce Plan two districts contain one person less than the ideal district population of 577,227. Under the Reed Plan, one district has two fewer voters than the ideal. The Hilliard Plan has a total deviation of .71% and an average deviation of .63%. The Modified Unity Plan shows a deviation of 1.6% with an average of .52%. The Unity Plan exhibits a total deviation of 1.15% and an average of .27%. Finally, the CD25 Plan has a deviation of .02%. Deviations in all these plans are not justified by any particular goal or interest.

24. Both the Pierce and Reed Plans contain a district with more than 65% African-American population. Under the Pierce Plan, District 7 contains an African-American population comprising 67.69% of the total residents of that District and 63.58% of that District's voting age residents. These percentages slightly exceed those in the majority African-American district (District 4) created by the Reed Plan: 66.69% total population and 62.93% voting age population. (Plaintiff's Exhibits 2 and 3; TR 15-16.) More significantly, as of December 1990, the African-American percentage of registered voters in the Pierce Plan's District 7 was 55.55%, which is 3% greater than the African-American percentage of registered voters in the Reed Plan's District 4.

25. Both the Reed Plan and the Pierce Plan provide African-Americans in Alabama with a substantial majority so as to permit them an opportunity to elect a candidate of their choice. The district in the Pierce Plan is slightly more weighted because it includes higher percentages of African-Americans in total population, voting age population and registered voter population.

26. The Hilliard Plan includes two majority African-American districts, with an African-American population of 59.33% and 61.98% respectively. Although this plan was submitted by the intervenors, they took the position that the Hilliard Plan probably provided obstacles of sufficient nature to cast doubt on their opportunity to elect candidates of their choice in these districts.

27. There are significant differences between the Pierce Plan and the Reed Plan in terms of compactness of their districts. District 1 of the Pierce Plan includes six closely contiguous counties in southwest Alabama, whereas District 1 under the Reed Plan includes Mobile County to the south and Tuscaloosa County to the north. District 2 under the Pierce Plan is largely composed of counties in the southeast corner of the state, while the Reed Plan's District 2 stretches from Mobile County, in the extreme southwest corner of the State, to Lee County, in east central Alabama. The Pierce Plan is superior to the Reed Plan in terms of compactness.[2]

28. The Pierce Plan maintains the integrity of individual voting

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2. The Reock Test indicates that the Reed Plan contains a district which is the least compact of any of the 35 districts analyzed by the Reapportionment Office. The Reed Plan's District 1 has a Reock Test measurement with less than 0.2 and by comparison, the average of the Pierce districts under the Reock Test is 0.41.

The Reock Test is a relatively simple method of measuring the relationship between the area of the district and the area of the smallest possible circumscribing circle. The resulting measure is a number between 1 to 0, with numbers closer to one being more compact. See *Karcher v. Dagget*, 462 U.S. 725, 756-57, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983)

precincts to a far greater degree than does the Reed Plan. The Pierce Plan splits only 10 voting precincts statewide, whereas the Reed Plan splits at least 57. (Plaintiff's Exhibits 2 and 3.) A redistricting plan should minimize precinct splitting when possible because of administrative problems encountered in the conduct of elections when precincts are split.

Furthermore, it is possible to construct a majority African-American district in Alabama using precincts as building blocks.

29. The Pierce Plan splits seven counties. The Reed Plan splits eight counties. The Hilliard Plan splits thirty-one counties.

30. The Pierce Plan also maintains the cores of existing districts to a much greater extent than the Reed Plan. Again, the most striking differences between the plans in this regard are apparent in Districts 1 and 2. There are also significant differences in District 3. The following table reflects the percentage of residents of existing Districts 1, 2, and 3 who remain in those districts under the Pierce and Reed Plans:

District	Pierce	Reed
1	97.2	64.3
2	86.7	57.0
3	85.2	75.0

31. As a consequence of its apparent disregard for maintaining the cores of existing Districts 1 and 2, the Reed Plan would also separate the incumbent congressmen in those districts from a large percentage of their current constituents. Under the Reed Plan, Congressman Callahan, the incumbent in the present District 1, would be placed in District 2. (Plaintiff's Exhibit 20.) District 2 under the Reed Plan contains only 25.6% of Congressman Callahan's existing constituents. Likewise, the Reed Plan would place Congressman Dickinson, the present incumbent in District 2,

in District 3 against District 3's incumbent, Congressman Browder. (Plaintiff's Exhibit 20.) 75.0% of the current residents of District 3 -- Congressman Browder's present constituents -- are included in the Reed Plan's District 3. However, only 19.0% of Congressman Dickinson's present constituents are included in that District.

32. Another consequence of the Reed Plan's distortion of Districts 1 and 2 is that the Pierce Plan better preserves the communities of interests in those two districts.

CONCLUSIONS OF LAW

33. The court has jurisdiction pursuant to the authority contained in 28 U.S.C. §§ 1331, 1343, 2284 and 42 U.S.C. § 1971 et seq.

34. Congressional redistricting is primarily and foremost a state legislative responsibility. It is therefore with great reluctance that we order an interim plan to become effective for the upcoming 1992 elections. It is out of deference to the Legislature that we have delayed our ruling until this time. In fact, we have afforded it every opportunity to fashion its own plan in order that it could fulfil its responsibility under the Constitution.[3]

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3. It was argued that the Legislature was unable to fulfill its obligation to redistrict because the census information it received in February 1991 might be subject to correction. This argument fails because the Supreme Court has previously indicated that the fact that the latest correction of the census is not available at the time the problem is addressed is of no moment to that effort. *Karcher v. Dagget*, 462 U.S. 725, 729, 77 L. Ed. 2d 133, 103 S. Ct. 2653 (1983).

35. Unfortunately, the Legislature has not yet precleared its adopted plan so that it can be in place for the impending elections, and we are bound by the Constitution not to permit these elections under the present districts.[4]

36. First and foremost, any court ordered redistricting plan must achieve precise population equality among its districts. *Wesberry v. Sanders,* 376 U.S. 1, 11 L. Ed. 2d 481, 84 S. Ct. 526 (1964); *Kirkpatrick v. Preisler,* 394 U.S. 526, 22 L. Ed. 2d 519, 89 S. Ct. 1225 (1969). This is to ensure that "as nearly as is practicable one man's vote in a congressional election will be worth as much as another's." *Wesberry,* 376 U.S. at 7-8. Put another way, Art. I, § 2 prohibits any population deviations among districts in a congressional redistricting plan without proper justification. *Kirkpatrick,* 394 U.S. at 531.

37. Among the plans submitted, only two meet this rigorous

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4. The Alabama law establishes the qualifying date for upcoming primary elections at April 3, 1992, and as noted *supra,* the ability of the Legislature to preclear its newly adopted plan appears illusory. Those who may desire to seek congressional office, and who must qualify by April 3, 1992, are left in a quandary as to what will be their district, when they are to qualify, when will the primaries actually be conducted, and, potentially, whether an election will be held at all. In addition to candidates being left in such a quandary, certain requirements of the law impact on the election officials, including the Probate Judges and others, who must conduct these elections. Lastly, the voters are impacted by the effect of potential delays as it affects the quality of their representation in the national legislature. For these reasons, this court finds that there is an emergency that requires judicial attention under the law in order to provide adequate relief for all affected, including the plaintiff. Since this is so, it becomes necessary for the court to consider an appropriate plan in light of the judicial standards imposed in drafting such plans as against those that might be considered by a legislature. *Chapman v. Meier,* 420 U.S. 1, 42 L. Ed. 2d 766, 95 S. Ct. 751 (1975); *Connor v. Finch,* 431 U.S. 407, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977).

standard[5] - the Pierce Plan and the Reed Plan. All the other plans which were submitted have unacceptable deviations. Further, none of the proponents of these plans provide an adequate justification for the deviation and we have "no authority to depart from the constitutional mandate of perfect equality in order to achieve some non-constitutional policy" that we believe will serve the public good.[6] *Connor,* 431 U.S. at 417.

38. If it is possible under constitutional restrictions, a court should consider expressed state policies and preferences. The Reapportionment Committee established guidelines by which to measure a proposed apportionment plan. These guidelines reflect constitutional considerations established by case and statutory law. Any redistricting plan should take into consideration: compactness/contiguity; preservation of political subdivisions; maintenance of communities of interest; and preservation of the core areas of existing districts.

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5. Precise population equality is a demanding standard requiring the states to "justify each variance no matter how small." *Karcher,* 462 U.S. at 730 (quoting Kirkpatrick, 394 U.S. at 530-31 (citations omitted)). See *Hastert v. State Bd. of Elections,* 777 F. Supp. 634 (N.D. Ill. 1991) (rejecting a plan with a .00297% population deviation because the plan's proponent could not justify its equality inferiority in comparison with another submitted plan with a .00017% deviation).

The advancement of information processing technologies in the last decade since Karcher have raised the deviation standard to an "absolute population equality," giving greater authority to the Court's 1983 statement that "rapid advances in computer technology and education during the last two decades make it relatively simply to draw contiguous districts of equal population and at the same time to further whatever secondary goals the state has." *Karcher,* 462 U.S. at 732.

6. Some of these parties argue that the population deviations in their plans can be zeroed out easily. This may be so, but we remind the parties that this type of computation is not this court's responsibility. If a party wishes to propose a plan for adoption by a court, then it is incumbent upon that party to fashion a plan that comports with the law.

39. Compactness addresses the geographic shape of districts. The most compact district is the district that is configured in the smallest possible area. See *Karcher,* 462 U.S. at 756-57. Preservation of political subdivisions promotes efficient representation, empowers a constituency's ability to organize productively, and serves as a deterrent to partisan gerrymandering. *Burton v. Hobbie,* 561 F. Supp. 1029, 1035 (M.D. Ala. 1983); *Ely v. Klahr,* 403 U.S. 108, 29 L. Ed. 2d 352, 91 S. Ct. 1803 (1971). Protecting communities of interest is meant to keep intact "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Carstens v. Lamm,* 543 F. Supp. 68 (D.C. Colo. 1982). Preserving cores of existing congressional districts prevents needless modifications and avoids pitting two incumbent congressmen against one another. *Karcher,* 462 U.S. at 740. Based on the findings made above, we conclude that the Pierce Plan better satisfies the above criteria than does the Reed Plan, or any of the other plans.

40. With regard to the majority African-American district, the parties entered into the following stipulation:

> According to 1990 data compiled and released by the United States Bureau of the Census, the African American population in the State of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district. Consequently, all parties agree that a significant majority African American Congressional district should be created.

(Supplemental Stipulation dated January 3, 1992.) This stipulation avoided the necessity of the court considering prolonged testimony regarding whether § 2 of the Voting Rights Act requires the creation of such a district under the circumstances present in this case. This court will honor the stipulation, and accordingly, will not make an independent determination of whether § 2 of the Voting Rights Act requires the creation of a majority Afri-

can-American congressional district in Alabama at this time. The court has found that the Pierce Plan creates a majority African-American district that provides African-Americans a reasonable opportunity to elect a candidate of their choice, and does so without the need for extensive gerrymandering. The court deems it inappropriate to make a judicial determination relative to what § 2 requires under the circumstances present in this case in light of the stipulation; the parties do not contest the matter and therefore it would be imprudent for the court to address it. This case does not require this court to decide whether the creation of a majority African-American district is mandated by either § 2 or the Constitution and as a matter of judicial restraint we do not undertake to do so.

41. Therefore, having followed the mandate in Karcher, while keeping in mind the desirability of preserving compactness, cores of all districts, communities of interest, and political subdivisions, we adopt the Pierce Plan except to the extent mentioned below.[7]

First, we have discovered no justifiable basis for the fact that the Pierce Plan places Congressman Erdreich and Congressman Harris in the same district. The Supreme Court has recognized the policy of "avoiding contests between incumbent representatives" as a legitimate objective. *Karcher,* 462 U.S. at 740. See also *Burton v. Hobbie,* 561 F. Supp. at 1035. Accordingly, we have modified the Pierce Plan so that the two congressmen will not be in the same district. Second, in working to achieve zero population deviation and redesign Districts 6 and 7, the affected districts were made marginally more compact in Jefferson and Tuscaloosa counties.

42. The court adopts a redistricting plan to be used in the

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7. When no plan submitted to a court fully comports with objectives and criteria that should be incorporated in a judicially approved plan, a court should fashion its own plan to satisfy relevant legal criteria and incorporate the most desirable aspects of the plans presented to the court. *Carstens v. Lamm,* 543 F. Supp. 68 (D.C. Colo. 1982).

conduct of congressional elections for the State of Alabama (to be called "The 1992 Alabama Redistricting Plan") in the event the Alabama Legislature fails to have precleared a redistricting plan in time for the conduct of those elections without delay under applicable state and federal laws. The plan is verbally described in Appendix A to Professor Stanley's report dated January 22, 1992. (See Order, Doc. #97). Appendix B to that report is a map depicting the plan. The map is appended simply to illustrate the plan, and Appendix A shall control in the event of any conflict between it and Appendix B. Appendix C to that report includes certain statistical data which the court finds to be accurate, none of the parties having posed objections to that data in response to this court's order.

43. A motion pending seeks a stay of any order by this court adopting a plan pending preclearance. We have reserved ruling on the motion until now. We conclude that there is no requirement that the plan which we now adopt be precleared before it becomes operative.[8]

44. First, the plan that we now adopt is a "court decreed" plan. *Connor v. Johnson,* 402 U.S. 690, 29 L. Ed. 2d 268, 91 S. Ct. 1760 (1971). It is clear that a plan must be precleared only if it is a "legislative plan." *McDaniel v. Sanchez,* 452 U.S. 130, 137, 68 L. Ed. 2d 724, 101 S. Ct. 2224 (1981). "The essential characteristic of a legislative plan is the exercise of legislative judgment . . . [that is], a proposal reflecting the policy choices of the elected representatives of the people . . . ." Id. at 152-53. See also 28 C.F.R. § 51.18 (1991) (stating that, in general, "changes affecting voting that are ordered by a federal court are subject to

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8. Section 5 of the Voting Rights Act, as amended, 42 U.S.C. § 1973c, requires a governmental body to obtain preclearance of a proposed plan either by securing a declaratory judgment from the United States District Court for the District of Columbia or by submitting the change to the Attorney General of the United States. As long as the Attorney General has not interposed an objection within sixty days after such submission, the state may enforce the change.

the preclearance requirements of section 5 to the extent that they reflect the policy choices of the submitting authority.").

The plan which this court adopts today is substantially the same as the plan offered by Plaintiff Wesch. Neither he, nor the party he is affiliated with, can claim to be exercising legislative judgment. We are certain that the Pierce Plan does not reflect the policy choices of the elected representative of the people. Cf. *McDaniel v. Sanchez,* 452 U.S. 130, 68 L. Ed. 2d 724, 101 S. Ct. 2224 (1981) (holding that a reapportionment plan submitted to a court by the legislative body of a covered jurisdiction was a legislative plan); *Campos v. City of Baytown, Texas,* 840 F.2d 1240 (5th Cir. 1988) (holding that plan proposed by the city was a legislative plan), cert. denied, 492 U.S. 905, 106 L. Ed. 2d 564, 109 S. Ct. 3213 (1989); *Farnum v. Burns,* 561 F. Supp. 83, 92 (D. R.I. 1983) (holding that plan drafted by a legislative consultant under the direction of the legislative body reflected the policy choices of the elected representative and was therefore a legislative plan).

45. Alternatively, it appears that the Legislature will not have a plan precleared in time to be in place for the April 3, 1992 qualifying deadline. For that reason, the situation calls for emergency action by this court. The Supreme Court acknowledged this exception to preclearance in *Upham v. Seamon,* 456 U.S. 37, 44, 71 L. Ed. 2d 725, 102 S. Ct. 1518 (1982):

> It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations. (citations omitted).

The Court later reaffirmed this exception in *McDaniel v. Sanchez,* 452 U.S. 130, 153, 68 L. Ed. 2d 724, 101 S. Ct. 2224 n.35 (1981), noting the ample power of the district courts to fashion

interim plans. See also *Burton v. Hobbie,* 561 F. Supp. at 1036 (recognizing the authority of a court to implement an interim plan so that an election can be held); 28 C.F.R. § 51.18(c) (1991) (acknowledging a federal court's authority to approve a plan without preclearance: "A federal court's authorization of the emergency interim use without preclearance of a voting change does not exempt from section 5 review any use of the practice not explicitly authorized by the court.").

For the foregoing reasons, the Motion is Denied.

46. We find that, at a minimum, district lines should become fixed one week prior to the April 3, 1992 qualifying date for candidates to allow both candidates and election officials the necessary time to evaluate them and choose their future conduct accordingly.

CONCLUSION

Congressional redistricting is a state legislature's fundamental task, but it becomes a judicial duty when a legislature fails to adopt and preclear a plan after having adequate opportunity to do so.

At the time this opinion is released, it is reported, although evidence of such is not before the court, that the Alabama legislature has passed a redistricting plan. It is also reported that the plan has not received preclearance by the Attorney General of the United States under § 5 of the Voting Rights Act of 1965.

Since this court recognizes that congressional redistricting is properly a matter to be determined by the legislature and that the federal courts should intervene only if the legislature fails to act in a constitutional manner, the question arises: Why should the court not consider the legislature's belatedly adopted plan and, if it is found by the court to comply with constitutional and legal requirements, adopt this expression of the legislative will as the court's plan and order it into effect immediately? The answer is

that this court has no legal authority to do so.

Section 5 of the Voting Rights Act requires a legislative plan to be submitted to the Attorney General for approval before it can be put into effect. The Attorney General has a period of 60 days to study the plan and express any objections he might have to it or to any of its provisions.

The Supreme Court has made clear that this requirement of the Voting Rights Act cannot be put aside by having a legislative plan approved by a federal district court (other than the U.S. District Court for the District of Columbia). *McDaniel v. Sanchez,* 452 U.S. at 130; *United States v. Board of Supervisors,* 429 U.S. 642, 51 L. Ed. 2d 106, 97 S. Ct. 833 (1977).

Thus, if we adopted the reported legislative plan, it would still be subject to the preclearance requirement, which might well require postponement of the primaries. This we are unwilling to do.

It should be clearly understood that this court does not wish to compete with the state legislature as to where congressional district lines should be drawn. It is, however, our responsibility to ensure that the voters of this state have the opportunity to choose their members of Congress from constitutionally drawn districts when elections are held at the time set by state law.

If the plan reportedly adopted by the legislature should be precleared by some expedited method no later than 12:00 noon, Central Time, March 27, 1992, one week before the statutory deadline for candidates to qualify to run, as set out herein, then that plan will take effect and those will be the congressional districts for the 1992 election. Otherwise, the legislature will have defaulted in its obligation to the people of the state and the plan described herein will take effect.

The plan adopted by this court shall become operative and

controlling for the 1992 congressional elections. Additionally, it shall govern the conduct of congressional elections after 1992 unless and until the Legislature for the State of Alabama adopts a plan and has it precleared in time for such elections to proceed without delay under applicable law.

The court will by separate document enter judgment consistent with this opinion.

[APPENDIX A -- 1990 TOTAL POPULATION STATE OF ALABAMA CONGRESSIONAL DISTRICTS -- OMITTED IN PRINTING]

[APPENDIX B -- DISTRICT SUMMARY TOTAL POPULATIONS, ALL AGES, WITH PERCENTS PLAN: CONG. DISTRICTS -- OMITTED IN PRINTING]

[APPENDIX C -- ATTRIBUTES OF CENSUS UNITS WITHIN ALABAMA TOTAL POPULATIONS, ALL AGES -- OMITTED IN PRINTING]

[APPENDIX D -- ATTRIBUTES OF CENSUS UNITS WITHIN ALABAMA ETHNIC BREAKDOWN OF VOTING AGE POPULATIONS -- OMITTED IN PRINTING]

[APPENDIX E -- LIST OF CONGRESSMEN AND THEIR RESIDENCE ADDRESSES -- OMITTED IN PRINTING]

Hand, Senior District Judge, concurring in judgment:

I concur in the Judgment and Order of the Court for the reasons expressed therein, except as noted below, but I write separately to emphasize a point which the opinion does not address as squarely as I feel it should. Accepting as fact the statements contained in the stipulation of the parties that this State has a substantial African-American minority that is relatively geographically compact so as to comprise a minority district which complies with the population equality requirement of *Karcher v. Daggett,* 462 U.S. 725 (1983), and no evidence or argument being presented that the establishment of such a district would violate any requirement of the law, I agree with the decision to accept the parties' joint request for the creation of such a district as a remedy and as a remedy only. In so doing, my concurrence should in no way be considered as an agreement that such a result is constitutionally mandated. It simply is not.

Those in high and low places who advocate racial gerrymandering to create African-American congressional districts would do well to remember the reasoned dissents of the first Mr. Justice Harlan wherein he stated in *Plessy v. Ferguson*: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 558, 41 L. Ed. 265, 16 S. Ct. 1138 (1895); and of Mr. Justice William O. Douglas who later addressed this point with an equally persuasive dissent in *Wright v. Rockefeller,* 376 U.S. 52, 11 L. Ed. 2d 512, 84 S. Ct. 603 ; 59-67 (1964):

> Here no Negroes are deprived of the franchise. Rather, zigzag tortuous lines are drawn to concentrate Negroes and Puerto Ricans into Manhattan's Eighteenth Congressional District and practically to exclude them from the Seventeenth Congressional District. . . .
>
> The intervenors are persons who apparently have a vested interest in control of the segregated Eighteenth District.

[footnote #4: Adam Clayton Powell has represented the Eighteenth District in Congress since 1945] They and the State seem to support this segregation not on the "separate but equal" theory of *Plessy v. Ferguson* but on another theory. Their theory might be called the theory of "separate but better off"--a theory that has been used before. . . .

Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. . . . That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. [footnote omitted]. But government has no business designing electoral districts along racial or religious lines.

. . .

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

"Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

As I perceive it, the chief danger, which these Justices recognized and so eloquently articulated, is judicial and legislative ghettoising of the vote. The resulting balkanization is antithetical to the American dream, and I do not wish to be associated with any such action or effort, thus I write separately to this point.

PAUL CHARLES WESCH, Plaintiff, MICHAEL FIGURES, et al.,
Intervenor-Plaintiffs, v. GUY HUNT, et al., Defendants.

CIVIL ACTION NO. 91-0787
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

FINAL JUDGMENT
March 9, 1992, Filed and Entered

Before COX, Circuit Judge, HAND, Senior District Judge, and ALBRITTON, District Judge.

BY THE COURT

It is ordered, adjudged, and decreed as follows:

1. It is declared that Ala. Code § 17-20-1 (1987), as it read prior to its amendment in 1992, if applied to congressional elections in 1992, violates Art. I, § 2 of the United states Constitution.

2. The defendants, individually, and their successors, agents, employees, attorneys, and those persons otherwise acting in concert or in participation with them who receive actual notice of this order, are ENJOINED from:

(a) conducting congressional elections in the State of Alabama under the districting plan heretofore established by Ala. Code § 17-20-1 (1987) as that section read prior to its 1992 amendment;

(b) failing to conduct congressional elections in 1992 in accordance with a redistricting plan adopted by this court and called "The 1992 Alabama Redistricting Plan," which is verbally described in Appendix A to this order. Appendix B to this order

is a map depicting the plan. (The map is appended simply to illustrate the plan, and Appendix A shall control in the event of any conflict between it and Appendix B). Provided, however, that the injunction contained in this paragraph (b) shall not be effective if the Alabama Legislature duly enacts a redistricting plan for the conduct of congressional elections in 1992 and has the same precleared no later than 12:00 noon, Central Time, March 27, 1992; and

(c) failing to conduct congressional elections in calendar years after 1992 in accordance with the 1992 Alabama Redistricting Plan described in paragraph (b) above. Provided, however, that the injunction contained in this paragraph (c) shall not be effective in the event the Alabama Legislature duly enacts a redistricting plan and has the same precleared in accordance with federal law in time for congressional elections to proceed without delay under then applicable state and federal law.

All the judges concur.

[APPENDIX A -- UNITS ASSIGNED TO A DISTRICT -- OMITTED IN PRINTING]

[APPENDIX B OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL CHARLES WESCH, Plaintiff,	)	
MICHAEL FIGURES, et al., Intervenor-Plaintiffs,	)	CIVIL ACTION NO. 91-0787
vs.	)	
GUY HUNT, et al., Defendants.	)	

ORDER

(Filed April 2, 1992)

Before COX, Circuit Judge, HAND, Senior District Judge, and ALBRITTON, District Judge.

BY THE COURT

The Fed. R. Civ. P. 60 motion of Intervenor-Plaintiffs to modify the court-ordered plan (being the motion filed on March 27, 1992) is DENIED.

In the Supreme Court of the United States

No. 91-1553

Billy Joe Camp, Secretary of State of Alabama, Appellant,
v Paul Charles Wesch, et al.

May 18, 1992

Appeal from the United States District Court for the Southern District of Alabama

The judgment is affirmed.

In the Supreme Court of the United States

No. 91-1992

Michael Figures, et al., Appellants v Guy Hunt, Governor of Alabama, et al.

February 22, 1993

Appeal from the United States District Court for the Southern District of Alabama

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PAUL CHARLES WESCH, Plaintiff, MICHAEL FIGURES, et al., Intervenor-Plaintiffs, vs. JAMES FOLSOM, et al., Defendants.	)	CIVIL ACTION NO. 91-0787

ORDER

(Filed July 21, 1993)

Intervenor-Plaintiff class members Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden have filed a motion to stay this Court's injunction pending appeal. For the reasons expressed below, this motion is **DENIED.**

The injunction issued by this Court on July 13, 1993, constitutes no more nor less than an injunction to enforce the prior judgment of the three judge court in this action. Consequently, the injunction issued on July 13, 1993, should be examined in conjunction with the memorandum opinion and final judgment issued on March 9, 1992, and the prior proceedings in this action.

This action was filed in this Court on September 23, 1991 contesting the constitutionality of the districting for congressional elections in the State of Alabama as a result

of the 1990 census which rendered the then existing Alabama law regarding same unconstitutional under the one man one vote rule. The matter was addressed by a duly convened three judge court. A plan was adopted and a final judgment was issued by the three judge court on March 9, 1992 after a hearing on the issue and consideration of six redistricting plans submitted by the parties. Pursuant to the final judgment entered in this case, the parties, including Plaintiff-Intervenors as a class defined "to include all qualified electors who are African-American residents of the State of Alabama" (Order of September 9, 1991 at Tab #51), were enjoined from using the prior districting plan and directed to use the Court's adopted plan for all future elections until such time, if ever, as the Legislature acted to change it, or, of course, if subsequent events (i.e., a subsequent census) rendered that plan unconstitutional under the one man one vote rule.

As heretofore stated, the parties to the litigation included all of the Black citizens of the State of Alabama who appeared as a class by counsel and through their representatives Michael Figures and Joseph Mitchell. Among the plans presented to and considered by the three judge court was a plan creating two predominately Black districts. This plan was submitted by the intervenors and was prepared by now Congressman Hillard. Testimony was introduced in regard to all plans, and the one adopted by the Court was determined by it to more clearly comply with the constitutional mandates.

This decision was contested both by the defendants in the *Wesch* case and by the Plaintiff-Intervenors and resulted in two separate appeals being filed with the

Supreme Court of the United States. Both appeals were resolved in favor of the opinion of the three judge court and its plan. The Legislature of the State of Alabama has not seen fit to alter or change the plan adopted by the court in this action. Consequently, the State of Alabama now has in place a constitutional plan by which congressional members have and may be elected and nothing has been offered to this Court that alters this fact.

Members of the class, namely the appellants here, who were parties to the three judge court proceedings, are obviously dissatisfied with the decision of the three judge court and the decision of the Supreme Court of the United States affirming the three judge court opinion. They have filed an action in the Alabama state courts contending that the failure of the Legislature to act gives them standing to impose their will. Not only has the issue been litigated to a conclusion, but there is no allegation that congressional elections in the State of Alabama will be conducted in an unconstitutional manner.

The purpose of the "relitigation" exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and one of the primary purposes of the injunction issued by this Court on July 13, 1993, is to halt needless and repetitive litigation in state court of an issue which has already been settled in a federal court.

The reliance by the appellants on the Supreme Court decision in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), is therefore misplaced. In *Growe* there was not only an unconstitutional election plan under attack but parallel actions in federal court and state court to correct the matter. That was and is not the case at

bar.[1] If the Legislature of the State of Alabama is content to continue the constitutional plan adopted in this action and now in force in the State of Alabama, then it does not lie with individual citizens to attack that decision in state court because they happen to disagree with it. The failure of the Legislature to alter a constitutional plan, whether adopted by a federal court or previously adopted by the Legislature itself, cannot be the basis for jurisdiction by the state courts to undertake to alter such a constitutional plan. If this were not the law, the election process would be subject to flux at the whim of any disgruntled or disappointed voter. *Growe* cannot be interpreted to encourage such disarray.

Finally, contrary to the appellants' contention, appellants as class members in an action which has been affirmed on two separate occasions by the Supreme Court will not suffer irreparable injury by the enforcement of a judgment so affirmed. The congressional elections scheduled in Alabama for 1994 are in no danger of being conducted under an unconstitutional plan. As a matter of law, no harm can result to the *Sinkfield* parties from the conduct of further elections under a plan which has already been held valid by the Supreme Court.

---

[1] Alabama Secretary of State Jim Bennett's reliance on *Scott v. Germano*, 381 U.S. 407, 409 (1965) and *Chapman v. Meier*, 420 U.S. 1, 27 (1975) is similarly misplaced. At issue in *Scott* and *Chapman* were unconstitutional districting plans, not the alteration or amendment of a constitutional districting plan in effect pursuant to a final judgment entered in federal court prior to any state court action.

For the reasons stated above, the Court concludes and it is therefore **ORDERED** that the motion to stay this Court's injunction pending appeal is due to be and is hereby **DENIED.**

DONE this 21st day of July, 1993.

/s/ W. B. Hand
W. B. HAND, Senior Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6607

PAUL CHARLES WESCH,

Plaintiff-Appellee.

MICHAEL FIGURES, CHARLES STEELE, GARRIA SPENCER,

Intervenors-Plaintiffs, Appellants,

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON, ANDREW HAYDEN,

Intervenors-Plaintiffs, Appellants,

versus

JAMES E. FOLSOM, JR., Governor, State of Alabama; JAMES H. EVANS, Attorney General; JIM BENNETT, Secretary of State; LIONEL W. NOONAN, Probate Judge; HARRY D'OLIVE, Probate Judge; DEVON WIGGINS, Probate Judge; OTHA LEE BIGGS, Probate Judge; JERRY BOGAN, Probate Judge; CLARENCE WATTERS, Probate Judge; TOM W. TURNER, Probate Judge, all sued in their official or representative capacities only,

Defendants,

ALABAMA DEMOCRATIC PARTY,

Movant.

Appeal from the United States District Court
for the Southern District of Alabama

(Filed Aug. 13, 1993)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

BY THE COURT:

The application to stay the district court's order and injunction pending the outcome of the appeal in this action is GRANTED. *See Growe v. Emison*, 113 S. Ct. 1075 (1993). This will permit the concurrent state court action to proceed.

The clerk of this court is ORDERED and DIRECTED to expedite this appeal and to assign this case to the next available oral argument panel.

The request to summarily reverse the judgment and injunction of the district court is DENIED.

The request to require appellees to file their response to the motion for summary reversal within ten days, and schedule oral argument on the motion within ten days thereafter, is DENIED as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-6607

PAUL CHARLES WESCH,
Plaintiff-Appellee,

versus

MICHAEL FIGURES, CHARLES STEELE, GARRIA SPENCER, DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, ANDREW HAYDEN,
Intervenors-Plaintiffs-Appellants,

JAMES E. FOLSOM, JR., Governor, State of Alabama; JAMES H. EVANS, Attorney General; JIM BENNETT, Secretary of State; LIONEL W. NOONAN, Probate Judge; HARRY D'OLIVE, Probate Judge; DEVON WIGGINS, Probate Judge; OTHA LEE BIGGS, Probate Judge; JERRY BOGAN, Probate Judge; CLARENCE WATTERS, Probate Judge; TOM W. TURNER, Probate Judge, all sued in their official or representative capacities only,
Defendants,

ALABAMA DEMOCRATIC PARTY,
Movant.

On Appeal from the United States District Court
for the Southern District of Alabama

(Filed Nov. 2, 1993)

ORDER:

Appellants' application for stay or recall of mandate pending application for writ of certiorari filed herein on October 27, 1993, is DENIED for the reasons set forth in this court's opinion entered on October 27, 1993.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC - 6 1993
OFFICE OF THE CLERK

No. 93-781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,
Petitioners,

v.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STELLE; GARRIA SPENCER; JAMES FOLSOM, JR., Governor of the State of Alabama; and JIM BENNETT, Secretary of State,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT JAMES FOLSOM, JR., GOVERNOR OF THE STATE OF ALABAMA, IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Where the district court adopts an interim congressional reapportionment plan due to the failure of the state to adopt a valid plan in time for an impending election, is the federal court obligated to defer to a state court as it would to the state legislature with respect to the adoption of a valid congressional reapportionment plan for a subsequent election?

2. Where the district court adopts an interim congressional reapportionment plan due to the failure of the state to adopt a valid plan in time for an impending election, is the state court barred from adopting a valid congressional reapportionment plan for a subsequent election?

PARTIES

The parties in the Court of Appeals are all shown in the Caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	2
I. UNDER *GROWE v. EMISON*, THE DISTRICT COURT WAS OBLIGATED TO DEFER TO THE STATE COURT AS IT WOULD TO THE STATE LEGISLATURE WITH RESPECT TO THE ADOPTION OF A VALID CONGRESSIONAL REAPPORTIONMENT PLAN	3
II. THE ADOPTION OF AN INTERIM REAPPORTIONMENT PLAN BY A FEDERAL COURT DUE TO THE FAILURE OF THE STATE TO ADOPT A VALID PLAN IN TIME FOR AN IMPENDING ELECTION, DOES NOT BAR THE STATE JUDICIARY FROM ADOPTING A VALID CONGRESSIONAL REAPPORTIONMENT PLAN FOR A SUBSEQUENT ELECTION	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Chapman v. Meier, 420 U.S. 1 (1975) 2
Growe v. Emison, 113 S. Ct. 1075 (1993) 2, 3, 4, 5
Opinion of the Justices, 254 Ala. 185, 47 So. 2d 714 (1950) 6
Scott v. Germano, 381 U.S. 407 (1965) 2, 5
Sinkfield v. Bennett, No. 93-689 (Cir. Ct. Montg. Co., Ala., amended complaint filed April 7, 1993) 6
Wesch v. Hunt, 785 F. Supp. 1491 (S.D. Ala. 1992) 4, 6, 7

Statutes:

42 U.S.C. § 1973c (1981) 4
U.S. CONST. art. I, § 2 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-781

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,
Petitioners,

v.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM, JR., Governor of the State of Alabama; and JIM BENNETT, Secretary of State,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT JAMES FOLSOM, JR., GOVERNOR OF THE STATE OF ALABAMA, IN SUPPORT OF THE PETITION

OPINIONS BELOW

Respondent James Folsom. Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding the Opinions Below. (Petition for Writ of Certiorari at 1.)

JURISDICTION

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding Jurisdiction. (Petition for Writ of Certiorari at 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the statement of the Petitioners regarding the Constitutional and Statutory Provisions Involved. (Petition for Writ of Certiorari at 2.)

STATEMENT OF FACTS

Respondent James Folsom, Jr., Governor of the State of Alabama, adopts the Petitioners' Statement of Facts. (Petition for Writ of Certiorari at 3-11.)

REASONS FOR GRANTING THE WRIT

Respondent Governor James Folsom, Jr. adopts the Reasons for Granting the Writ presented by the petitioners as set forth in their Petition for Writ of Certiorari (Petition for Writ of Certiorari at 12); and in addition, Respondent Folsom states the following:

This Court should grant a Writ of Certiorari because the decision of the court of appeals squarely conflicts with this Court's decision in *Growe v. Emison*, 113 S. Ct. 1075 (1993), which reaffirmed this Court's decisions in *Chapman v. Meier*, 420 U.S. 1 (1975) and *Scott v. Germano*, 381 U.S. 407 (1965).

Growe reaffirmed the proposition that "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman* at 27. *Growe* requires that the federal court defer to the state judiciary as it would to the state legislature with respect to the adoption of a valid reapportionment plan. The decision of the court of appeals directly conflicts with *Growe* because, while acknowl-

edging that the federal court plan may be replaced at any time by a valid plan adopted by the legislature, the court of appeals interpreted *Growe* to mean that a federal court must defer to a state judiciary's efforts to adopt a valid reapportionment plan only if the state judiciary has initiated its efforts *prior* to the adoption of the federal court plan. This clearly contravenes this Court's decision in *Growe*, because *Growe* obligates the federal court to extend to the state judiciary the same "window of opportunity" for the adoption of a valid reapportionment plan that it would extend to the state legislature.

I. UNDER *GROWE v. EMISON*, THE DISTRICT COURT WAS OBLIGATED TO DEFER TO THE STATE COURT AS IT WOULD TO THE STATE LEGISLATURE WITH RESPECT TO THE ADOPTION OF A VALID CONGRESSIONAL REAPPORTIONMENT PLAN.

The central question presented in the instant case is whether the federal court is obligated to defer to the state court, as it would to the state legislature, with respect to congressional redistricting. In light of *Growe*, that question must be answered in the affirmative, because "both state branches" (the state legislature and the state judiciary) are preferred to "federal courts as agents of apportionment." *Growe* at 1081.

Petitioners have correctly argued that "the principal responsibility [for reapportionment] lies with the state," and "the role of the federal judiciary is as a secondary guarantor of voters' constitutional rights." (Petition for Certiorari at 13) (alteration in original). This responsibility is specifically delegated to the states by the United States Constitution. U.S. CONST. art. I, § 2. Consequently, any timely endeavor by the state, whether through its legislature or its judiciary, to fulfill its responsibility to adopt and implement a valid congressional redistricting plan for a future election, should be given proper deference by a federal court.

The principle in *Growe*, which establishes that a federal court should defer to either a state court or a state legislature with respect to reapportionment, is a reaffirmation of the state's fundamental right to address the "highly political task" of designing its own state legislative and congressional districts. *Growe* at 1080. Such deference is due even under circumstances where federal court action precedes timely action by a state court or state legislature, because the state always retains the primary responsibility for reapportionment. See *Id.* at 1081. ("[T]he primacy of the state in designing those districts compels a federal court to defer.").

The district court acknowledged the state's retention of the primary responsibility for reapportionment and its continuing right to deference with respect to the exercise of this right by expressly characterizing the 1992 Alabama Redistricting Plan as an "interim" plan. The district court made it clear that a reapportionment plan adopted by the state legislature could replace the federal court plan at any time, as long as said legislative plan was precleared by the Department of Justice as required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in time for the election process "to proceed without delay," *Wesch v. Hunt*, 785 F. Supp. 1491, 1501 (S.D. Ala. 1992). The district court even provided that a plan by the legislature would be allowed to supersede the district court's interim plan for the 1992 elections, as long as it was ready "one week before the statutory deadline for candidates to qualify." *Id.* at 1501. Unquestionably, the district court recognized that it had adopted a "back-up" plan only, and that a valid state legislative plan could replace a federal court plan at any time.

The courts below erred by failing to recognize that a reapportionment plan fashioned by the state judiciary also should supersede a federal court plan at any time. As petitioners have pointed out, the decisions of the courts below erroneously limit the state judiciary's "window of

opportunity" for adopting a reapportionment plan to a "one-time" opportunity *before* a federal court plan is implemented. (Petition for Writ of Certiorari at 12.) By limiting the adoption of a state court reapportionment plan to instances in which the federal court has not yet adopted an interim plan, the courts below directly challenge the principal proposition in *Growe* and fail to acknowledge that this court has specifically "encouraged" the state judiciary to be involved in the reapportionment process. See: *Growe* at 1081; *Scott* at 409.

The disparate treatment of the state legislature and the state judiciary by the courts below, with respect to *when* the federal court must defer to a state's efforts to adopt its own valid redistricting plan, reflects a tension between the federal judiciary and the state judiciary that adherence to the correct meaning of *Growe* would avoid. This tension is best illustrated by references in the decision of the court of appeals that suggest that state court redistricting lawsuits such as the instant case, if allowed to proceed, would "strip all federal courts of the ability to meaningfully redistrict" (Petition for Writ of Certiorari app. at 14-a), and "oust and replace the federal court plan" (Petition for Writ of Certiorari app. at 13-a). Efforts by the state legislature to replace the federal court plan with a state legislative plan would not be characterized as "stripping" the federal court of the power to redistrict, nor would the replacement of a federal court plan by a legislative plan be considered "ousting" the federal court plan.

The tension between the federal and state judiciary with respect to redistricting also is evidenced by the reference in the decision of the court of appeals to the "great deal of time and other resources" expended by the district court in adopting the 1992 Alabama Redistricting Plan. (Petition for Writ of Certiorari app. at 13-a.) The expense of time and resources by the district court would not be raised by the court of appeals if the state legisla-

ture were the branch of the state endeavoring to adopt a plan to supplant the federal court interim plan. Furthermore, although the time and other resources invested by the district court are not relevant to the issues presented herein, it is important to point out that said time and resources were appropriately invested and will not have been wasted if a state court plan is used in the 1994 elections. The 1992 Alabama Redistricting Plan was implemented in the 1992 elections and should serve as a "back-up" plan for the remainder of the decade.

II. THE ADOPTION OF AN INTERIM REAPPORTIONMENT PLAN BY A FEDERAL COURT DUE TO THE FAILURE OF THE STATE TO ADOPT A VALID PLAN IN TIME FOR AN IMPENDING ELECTION, DOES NOT BAR THE STATE JUDICIARY FROM ADOPTING A VALID CONGRESSIONAL REAPPORTIONMENT PLAN FOR A SUBSEQUENT ELECTION.

The reapportionment lawsuit in Alabama state court, *Sinkfield v. Bennett*, No. 93-689 (Cir. Ct. Montg. Co., Ala., amended complaint filed April 7, 1993), provides an opportunity for a branch of the state to fulfill the state's continuing constitutional duty to "apportion representation," See Opinion of the Justices, 254 Ala. 185, 186, 47 So. 2d 714, 716 (1950). Therefore, the interim plan adopted by the district court with "great reluctance," *Wesch* at 1497, due to the state's failure to adopt a plan in time for the 1992 elections, should not serve as a bar to efforts by said state court to adopt a reapportionment plan for the 1994 elections.

The court of appeals affirmed the judgment of the district court, which enjoined the *Sinkfield* proceedings, primarily on the basis that the "district court's injunction was necessary both in aid of its jurisdiction and to protect and effectuate its prior judgment." (Petition for Writ of Certiorari app. at 12-a.) The court of appeals explained the basis of the district court's injunction as follows:

> The district court here based its injunction on the long recognized power of courts of equity to effectuate their decrees by injunctions or writs of assistance and thereby avoid relitigation of questions once settled between the same parties. (Petition for Writ of Certiorari app. at 10-a.)

Essentially, the courts below determined that the issue before the state court had already been settled and, therefore, the state court proceeding should be enjoined. The courts below erred, however, because the issue of reapportionment was never settled by the district court. Unlike most lawsuits, the congressional redistricting lawsuit tried by the district court in *Wesch* resulted in producing only an interim plan. The parties to the litigation and the district court recognized that at any time a totally different reapportionment plan adopted by the state legislature could supersede the interim plan adopted by the federal court. Neither the district court nor the parties were ever under the illusion that the issue of congressional reapportionment was settled by the conclusion of the lawsuit. Consequently, traditional arguments based on res judicata theories are inapplicable in this instance. Even the court of appeals acknowledged that the application of res judicata to congressional redistricting cases presents a "thorny" question. (Petition for Writ of Certiorari app. at 16-a.)

The court of appeals also based its decision to affirm the judgment of the district court on the theory that the state court was attempting to institute "redistricting at will." (Petition for Writ of Certiorari app. at 14-a.) This concern fails to recognize the competency and power of the state judiciary to protect the election process and the judicial process. Certainly Alabama's judiciary, like the district court in *Wesch*, is competent "to ensure that the voters of this state have the opportunity to choose their members of congress from constitutionally drawn districts when elections are held at the time set by state law," *Wesch* at 1501. Furthermore, the Alabama judi-

ciary, like the federal judiciary, is committed to "promoting stability in elections" (Petition for Writ of Certiorari app. at 17-a), and ensuring judicial efficiency and judicial economy. Concerns by the courts below that there would be a flood of redistricting suits or that the "election process would be subject to flux at the whim of any disgruntled or disappointed voter" (Petition for Writ of Certiorari app. at 4-c), are unwarranted. Respondent Governor Folsom is confident that the Alabama judiciary is fully competent to prevent the "disarray" (Petition for Writ of Certiorari app. at 4-c), of the election process feared by the district court.

The court of appeals correctly states that "*Growe* requires deferral not abstention," (Petition for Writ of Certiorari app. at 19-a); however, the court fails to recognize that abstention is not at issue in the instant case. The district court is not being asked to abstain. It has already acted and appropriately performed its "back-up" role by adopting the 1992 Alabama Redistricting Plan in time for the 1992 elections. Under *Growe*, however, the district court should have deferred to the state court's efforts to adopt a valid congressional redistricting plan for the 1994 elections. As petitioners have properly argued:

> [A] districting plan affects voters not just once but every time there is a new election. Every time new congressional elections roll around without the State of Alabama carrying out its responsibility under both state and federal constitutions to redraw congressional districts, a new violation of the rights of Alabama's citizens occurs. (Petition for Writ of Certiorari at 14.)

Accordingly, in light of *Growe*, the 1992 interim plan adopted by the district court was not a bar to efforts by the state judiciary to adopt a valid plan for the 1994 elections, because the 1994 elections presented a new opportunity for the state to act. Therefore, the district

court should not have enjoined the state judiciary from completing its task.

CONCLUSION

Congressional reapportionment of the State of Alabama is primarily the responsibility of the State of Alabama, not the federal courts; furthermore, it is a continuing responsibility that is not obviated by the adoption of an interim plan by a federal court. In light of *Growe*, the state judiciary, as a branch of the state, must be given the same opportunities as the state legislature to adopt a valid congressional reapportionment plan to supersede the interim federal court plan. The court of appeals erred by affirming the district court's injunction and judgment enjoining the state court from adopting a valid congressional reapportionment plan to be used in the 1994 elections; therefore, Respondent Governor Folsom prays this Court will grant certiorari and reverse the judgment below.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993
No. 93-781

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON and ANDREW HAYDEN,

Petitioners,

vs.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM; and JIM BENNETT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

---

RESPONDENT ALABAMA SECRETARY OF STATE JIM BENNETT'S RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

1. Did the federal courts below err in enjoining state court proceedings concerned with the formulation and implementation of a congressional redistricting plan for the State of Alabama?

2. Where the District Court recognized that its 1992 interim plan would be superseded if the state legislature adopted a congressional redistricting plan for the 1994 elections, did the courts below err in not affording equal deference to the state judiciary?

Parties

The parties in the Court of Appeals are all shown in the caption.

Table of Contents

Questions Presented i

Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of Facts 2

Reasons for Granting the Writ 3

Argument..... 5

Conclusion 11

Table of Authorities

Cases:

Chapman v. Meier, 420 U.S. 1,
95 S.Ct. 751,
42 L.Ed.2d 766 (1975)..... 3, 5, 8

Growe v. Emison, ____ U.S. ____,
113 S.Ct. 1075,
122 L.Ed.2d 388 (1993) 3, 4, 6
8, 10

Scott v. Germano, 381 U.S. 407,
85 S.Ct. 1525,
14 L.Ed.2d 477 (1965)..... 3, 5, 8

Sinkfield v. Bennett, C. A.
No. 93-689-PR (Circuit Court of
Montgomery County, Alabama)..... 4

Wesch v. Hunt, 785 F. Supp. 1491
(S. D. Ala. 1992)..... 7

Statutes and Constitutional Provisions:

U.S. Const., Art.I, §2..... 5

Code of Alabama, 1975 §17-16-6.... 10

Code of Alabama, 1975 §17-16-11... 10

Opinions Below

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding the opinions below as presented on p. 1 of their Petition for Writ of Certiorari.

Jurisdiction

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding jurisdiction as presented on pp. 1-2 of their Petition for Writ of Certiorari.

Constitutional and Statutory Provisions Involved

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding the constitutional and statutory provisions involved as presented on p. 2 of their Petition for Writ of Certiorari.

Statement of Facts

Secretary Bennett adopts the Sinkfield Petitioners' Statement of Facts as presented on pp. 3-11 of their Petition for Writ of Certiorari.

Reasons for Granting the Writ

Respondent Bennett adopts the reasons for granting the writ presented by the Sinkfield Petitioners in their Petition for Writ of Certiorari and in addition states as follows:

This Court should grant a writ of certiorari because the Court of Appeals' decision squarely conflicts with Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965); and Growe v. Emison, ____ U.S. ____, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), in which this Court ruled that federal courts should defer to states' efforts to redistrict themselves.

Under these decisions, the deference the federal courts should give to state redistricting efforts extends not only to state legislatures but to state court redis-

tricting proceedings as well. The District Court recognized that its 1992 interim plan would be superseded if the state legislature adopted a congressional redistricting plan for the 1994 elections. However, the District Court erred in not affording the state judiciary equal deference, as required by this Court in Growe v. Emison, and the Court of Appeals similarly erred in affirming the District Court's decision. Therefore, the Eleventh Circuit Court of Appeals should be reversed and the state court congressional redistricting litigation in Sinkfield v. Bennett, C. A. No. 93-689-PR (Circuit Court of Montgomery County, Alabama) allowed to proceed.

Argument

Redistricting Alabama's congressional districts is the prerogative of the State of Alabama, through its legislature or--should the legislature fail to act--through other state agencies, including the state judiciary. The United States Constitution leaves the primary responsibility for apportioning state legislative and federal congressional districts with the states themselves. U. S. Const., Art. I, § 2.

This Court has held that responsibility for reapportionment is primarily the duty of a state "through its legislature or other body" rather than of federal courts. Chapman v. Meier, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766, 784 (1975). In Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965), this Court held that both the legislative and judicial branches

of state government are preferred to federal courts as agents of reapportionment. 381 U.S. 407, 409.

Finally, this Court's most recent decision regarding the relation of state and federal courts relative to redistricting proceedings in Growe v. Emison, ____ U.S. ____, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), is unequivocal in affirming the primacy of states, including their judiciaries, in designing their legislative and congressional districts. This primacy "compels a federal court to defer" to state court redistricting proceedings. 113 S.Ct. at 1081.

In its July 21, 1993 order enjoining state court congressional redistricting proceedings, the District Court attempts to distinguish Growe by stating that unlike the case at bar, the state in Growe was operating under an unconstitutional plan and the

federal judicial proceeding was parallel to the state court case rather than prior to it (See Petitioners' Appendix, p. 1-c). The District Court order stated that if a constitutional plan is put in place by a federal court, individual citizens cannot later attack the plan in a state court. However, contrary to the District Court's order, the issue is not whether federal court-ordered congressional redistricting plan under which the State of Alabama is now operating is constitutional. The issue, rather, is whether the District Court must give the state judiciary the same deference as it does the state legislature with respect to redistricting.

The congressional redistricting plan implemented in Wesch v. Hunt, 785 F. Supp. 1491 (S. D. Ala. 1992) under the District Court's final judgment is on its own terms an interim plan which shall not remain in

effect in the event the Alabama Legislature enacts a redistricting plan and has the same precleared (See Petitioners' Appendix, p. 24-b). Under Growe v. Emison, the deference which the District Court extends to legislative action on redistricting must be understood to extend to **state judicial action** on redistricting as well. Both are branches of the state which have primacy over federal courts in redistricting matters. Respondent Bennett's position is that, in light of the deference to state court redistricting proceedings mandated under Scott v. Germano, Chapman v. Meier and Growe v. Emison, a state court congressional redistricting plan is able to supplant an interim federal plan in the same way as can a legislatively-produced plan.

In Growe v. Emison, this Court held that there is only one justification compelling enough to allow a federal court to

interfere with a state's exercise of its redistricting prerogative:

> Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportion- ment nor permit federal litigation to be used to impede it. Growe v. Emison, 113 S.Ct. 1075 (1993).

The single reason given by this Court to allow a federal court to intervene in a state's redistricting process--failure by the state to adopt a plan in time to be used in the upcoming elections--is manifestly not present in this case. The state court in this case was proceeding in timely fashion until those proceedings were enjoined by the District Court, which injunction was at first stayed and then later reinstated by the Court of Appeals. The state court could still formulate a congressional redistricting plan in time for the upcoming election cycle if only allowed to

do so. The filing deadline for congressional primary elections in Alabama is April 8, 1994; the primary election itself is on June 7, 1994. Code of Alabama, 1975 § 17-16-6 (Primary to be held on first Tuesday in June) and § 17-16-11 (Filing deadline for primary is no later than 60 days before the date of the primary).

Therefore, the necessary justification for federal judicial intervention in the Montgomery County Circuit Court congressional redistricting proceedings is absent. The federal court injunction of state court redistricting proceedings under these circumstances constitutes just the sort of "affirmative obstruction" of state reapportionment efforts that this Court warned against in Growe v. Emison. The District Court's injunction, and the Court of Appeals affirmance thereof, in effect bars the state court from doing what state courts have been en-

couraged to do by this Court for the past several decades.

Conclusion

States have the primary responsibility for redistricting their congressional districts. In situations in which a federal court congressional redistricting plan is already in place, a state may (and constitutionally should) still act to fashion its own plan, through its legislature or through its judiciary. In the instant case, the federal district court has properly fulfilled its function of serving as a "backstop" when Alabama's state legislature failed to pass a congressional redistricting plan and obtain preclearance for it prior to the 1992 election cycle. The State of Alabama, acting through its state courts, is now prepared to proceed with congressional redistricting for the next round of elec-

tions. It should be allowed to do so. Accordingly, Respondent Secretary of State Bennett respectfully requests that this Court grant the writ of certiorari sought by the Sinkfield Petitioners in this proceeding.

Respectfully submitted,

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No. 93-781

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON and ANDREW HAYDEN,

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vs.

PAUL CHARLES WESCH, MICHAEL FIGURES, JOSEPH MITCHELL, CHARLES STEELE, GARRIA SPENCER, JAMES FOLSOM and JIM BENNETT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT PAUL CHARLES WESCH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22 pp

QUESTION PRESENTED FOR REVIEW

Whether a District Court abused its discretion when it enjoined a state court congressional redistricting action under the following circumstances:

1. The state court action was not commenced until after the District Court had entered, in an action in which the state court plaintiffs were represented as members of a certified class of Plaintiff/Intervenors, a final judgment implementing a remedial redistricting plan for the remainder of this decade or until the state legislature enacts a timely, valid plan of its own.

2. The state court action was not commenced until after the 1992 congressional elections had been conducted under the District Court's remedial plan.

3. The state court action was not commenced until after this Court had twice upheld the District Court's plan on appeal, including one appeal by the certified class (including the state court plaintiffs) which raised the same contention which formed the apparent basis of the later state court lawsuit.

4. Notwithstanding the allegations of their state court complaint, the state court plaintiffs conceded that the remedial plan adopted by the District Court was a valid, constitutional plan.

PARTIES

The parties in the Court of Appeals are shown on the caption on the cover of this brief. The parties in the District Court who did not appear in the Court of Appeals are listed in footnote 1 of the Petition for Writ of Certiorari.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties	ii
Table of Authorities	iv
Citations of the Opinions and Judgments Delivered in the Courts Below	1
Statement of the Grounds of Jurisdiction	1
Statutes Involved	2
Statement of the Case	3
Summary of the Argument	7
Argument	9
Conclusion	16

TABLE OF AUTHORITIES

Page(s)

Cases:

AAA Equipment and Rental Co. v. Bailey, 384 So.2d 107 (Ala. 1980) 11

Battle v. Liberty National Life Insurance Co., 877 F.2d 877 (11th Cir. 1989) 10

Camp v. Wesch, __ U.S. __, 112 S.Ct. 1926, 118 L.Ed.2d 525 (1992) 6

Delta Airlines, Inc. v. McCoy Restaurants, Inc., 708 F.2d 528 (11th Cir. 1983) 9

Ex parte State ex. rel Tucker, 236 Ala. 284, 181 So. 761 (1938) 16

Figures v. Hunt, __ U.S. __, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993) 6

Fowler v. Birmingham News Co., 608 F.2d 1055 (5th Cir. 1979) 12

Geer Brothers, Inc. v. Crump, 349 So.2d 577 (Ala. 1977) 11

Growe v. Emison, __ U.S. __, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) 7,12,13,14,15,16

Hughes v. Allenstein, 514 So.2d 858 (Ala. 1987) 11

Kelly v. Merrill Lynch, Pierce, Fenner & Smith, 985 F.2d 1067 (11th Cir. 1993) 9

Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631 (5th Cir. 1971) 9

Longshore v. City of Homewood, 277 Ala. 444, 171 So.2d 453 (1965) 15

McCall-Bey v. Franzen, 777 F.2d 1178 (7th Cir. 1985) 10

NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 11

Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 15

Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965) 13

Southwest Airlines Co. v. Texas International Airlines, 546 F.2d 84 (5th Cir. 1977) 11

Suntex Dairy v. Bergland, 591 F.2d 1063 (5th Cir. 1979) 10

U.S. v. Fisher, 864 F.2d 434 (7th Cir. 1988) 10

Ward v. Pennsylvania New York Central Transportation Co., 456 F.2d 1046 (2d Cir. 1972) 9

Wesch v. Hunt, 785 F.Supp. 1491 (S.D. Ala. 1992) 3,4

Statutes/Rules of Procedure:

28 U.S.C. § 1651 2,6,7,9

28 U.S.C. § 2283 2,6,7,9

28 U.S.C. § 2284 2

42 U.S.C. § 1973 3

Supreme Court Rule 10.1 16

Rule 23(b)(1)(B), *Federal Rules of Civil Procedure* 3

Rule 60(b), *Federal Rules of Civil Procedure* 5,12

No. 93-781

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OCTOBER TERM, 1993

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On Petition for a Writ of Certiorari to the
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RESPONDENT PAUL CHARLES WESCH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Respondent Wesch adopts the statement set forth on page 1 of the Petition for Writ of Certiorari.

STATEMENT OF THE GROUNDS OF JURISDICTION

The Respondent Wesch adopts the statement set forth on page 1 of the Petition for Writ of Certiorari.

STATUTES INVOLVED

28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

The Respondent Paul C. Wesch ("Wesch") initiated this litigation on September 23, 1991 in the United States District Court for the Southern District of Alabama. His complaint alleged that Alabama's congressional districts were unconstitutionally malapportioned and that the Alabama Legislature had failed to re-draw the districts following the 1990 census. Therefore, the complaint sought an injunction against the conducting of any further elections under the existing districts and the implementation of a remedial redistricting plan. The named Defendants were Alabama's Governor, Secretary of State and Attorney General, and the seven Probate Judges in the counties comprising Alabama's First Congressional District, where Wesch resided and voted. A three-judge panel was convened to hear the case pursuant to 28 U.S.C. § 2284.

On December 4, 1991, Michael Figures and Joseph Mitchell moved to intervene on behalf of themselves and on behalf of all qualified electors who were African-American residents of Alabama. Their complaint in intervention alleged that Alabama's existing congressional districts violated Section 2 of the Voting

Rights Act, 42 U.S.C. § 1973, because they did not "allow for the election of an African-American to Congress from the State of Alabama." The District Court granted the Motion to Intervene and certified the Intervenors as a class pursuant to *Federal Rule of Civil Procedure* 23(b)(1)(B), with Figures and Mitchell serving as class representatives.

At trial, the parties, including the African-American Intervenors, entered into the following stipulation with regard to the creation of a majority African-American district:

> According to 1990 data compiled and released by the United States Bureau of the Census, the African-American population in the state of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African-American congressional district. Consequently, all parties agree that a significant majority African-American congressional district should be created.

The parties submitted six proposed redistricting plans to the District Court. *Wesch v. Hunt*, 785 F.Supp. 1491, 1495 (S.D.Ala. 1992). Five of these plans were proposed by the African-American Intervenors. Only one of these plans, however, the Hilliard Plan, contained two majority African-American district. *Id.* at 1496. Although the Intervenors presented testimony in support of the Hilliard Plan,[1] other witnesses who testified on behalf of the Intervenors, including their expert, expressed reservations concerning whether two viable majority African-American districts could be created in Alabama. The District Court concluded that the Intervenors "took the position that the Hilliard Plan probably provided obstacles of sufficient nature to cast doubt on their opportunity to elect candidates of their

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[1] The Intervenors offered testimony in support of the Hilliard Plan even though neither of its majority African-American districts had an African-American population of 65% or more, as called for by the stipulation.

choice" in that Plan's proposed majority African-American districts. *Id.*

On March 9, 1992, the District Court entered its final judgment. *Id.* at 1501. The Court (a) declared Alabama's existing congressional districts unconstitutional; (b) enjoined the holding of any further elections under the existing districts; and (c) implemented the "1992 Alabama Redistricting Plan" for use in the 1992 congressional elections and thereafter, unless and until the Alabama Legislature enacted a timely, valid redistricting plan. The District Court's final judgment specifically provided that the Defendants were enjoined from

> *failing to conduct congressional elections in calendar years after 1992 in accordance with the 1992 Alabama Redistricting Plan described in Paragraph (b) above.* Provided, however, that the injunction contained in this paragraph (c) shall not be effective in the event the Alabama Legislature duly enacts a redistricting plan and has the same precleared in accordance with federal law in time for congressional elections to proceed without delay under then applicable state and federal law.

Id. at 1501-02 (emphasis added). The "1992 Alabama Redistricting Plan" adopted by the District Court was substantially the same as the plan which had been submitted by the Respondent Wesch. *Id.* at 1500. The Court's plan included a single majority African-American district with an African-American population of 67.53%. *Id.* at 1557-81.[2]

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[2] The Petitioners erroneously assert that the District Court "considered" only two of the six plans submitted because the other four did not achieve precise population equality among the districts. Petition for Writ of Certiorari p. 7. However, the District Court *did* "consider," and heard testimony concerning, all of the plans submitted, including the Hilliard two-district plan. The District Court simply concluded, on the merits, that it could not constitutionally adopt any of the plans which did not meet the requirement of exact population equality. *Wesch*, 785 F.Supp. at 1497-98.

The District Court also noted in its final judgment that the Alabama Legislature had enacted a congressional redistricting plan, but that the Legislature's plan had not yet been precleared by the Attorney General under Section 5 of the Voting Rights Act. *Id.* at 1500. The Legislature's plan, like the District Court's plan, contained a single majority African-American district. On March 27, 1992, the Attorney General refused to preclear the Legislature's plan because the state had failed to adequately explain why a second majority African-American district was not created. Thereafter, the African-American Intervenors filed a Rule 60(b) motion which asked the District Court to modify its plan to include a second majority African-American district, arguing that such was required in light of the Attorney General's objection to the Legislature's plan. The District Court denied the Intervenors' motion, and they appealed to this Court. In their jurisdictional statement filed with this Court, the Intervenors specifically argued that the District Court should be required to implement a two-majority African-American district plan for use in the 1994 elections, and thereafter:

> Assuming, *arguendo*, that the Court's refusal to modify its remedial plan was justified by the exigencies of the upcoming election, this Court should still summarily reverse and remand for curative action by the District Court. The Court's final judgment expressly requires that the court-ordered plan be used not just in the 1992 elections, but also "in calendar years after 1992" unless a legislative plan is precleared "in time for congressional elections to proceed without delay under then applicable state and federal law." 6A. *While it is now too late to adopt a racially fair plan for the 1992 elections — and Appellants do not seek to do so — there is no basis for permitting any further use of the court's flawed remedial plan.*

(Appellants' Jurisdictional Statement in *Figures v. Hunt*, Case No. 91-1992, n. 10) (emphasis added). This Court, however,

summarily affirmed the District Court's refusal to modify its plan. *Figures v. Hunt*, __ U.S. __, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993).[3] In the meantime, the 1992 congressional elections were held under the District Court's plan.

After this Court affirmed the District Court's refusal to modify its plan, the Petitioners Darryl Sinkfield, et al filed an amended complaint in the Circuit Court of Montgomery County, Alabama in a civil action styled *Sinkfield v. Camp*. The Petitioners alleged that they are all registered African-American voters in the State of Alabama, and sued on their own behalf and as representatives of a class composed of all African-American citizens of Alabama. Their original complaint in the state court case related only to state legislative redistricting. Their amended complaint, however, asserted that the Legislature's failure to re-draw Alabama's congressional districts deprived the Petitioners of certain rights guaranteed under the Alabama and United States Constitutions and Section 2 of the Voting Rights Act. The apparent basis for these claims was that Alabama has only one majority African-American congressional district. The amended complaint further asked the state court to implement a redistricting plan of its own.

Wesch moved the District Court to stay the state court proceedings, to the extent that they related to congressional redistricting, pursuant to the All-Writs Act, 28 U.S.C. § 1651, and the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, which specifically empower a federal court to enjoin state court proceedings in aid of its jurisdiction, or to protect or effectuate its judgments. After a hearing on July 13, 1993 at which counsel for

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[3] The Defendant Billy Joe Camp filed a separate appeal to this Court, alleging that the District Court erred when it refused to adopt the plan enacted by the Legislature, but subsequently rejected by the Attorney General, as its remedial plan. This Court summarily affirmed the District Court. *Camp v. Wesch*, __ U.S. __, 112 S.Ct. 1926, 118 L.Ed.2d 525 (1992).

the Petitioners appeared, the District Court granted Wesch's motion and enjoined any further proceedings in the state court case with regard to congressional redistricting.

The Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, which stayed the District Court's injunction so that the state court action could proceed pending appeal. The state court case was tried on October 1, 1993 but no decision was rendered. On October 25, 1993, the Eleventh Circuit entered its order affirming the District Court's injunction and vacating its stay pending appeal. (Appendix to Petition for Writ of Certiorari 1-a). The Petitioners now seek a writ of certiorari from this Court and a reversal of the Eleventh Circuit's ruling.

SUMMARY OF THE ARGUMENT

1. The lower courts did not abuse their discretion in enjoining a congressional redistricting action in a state court. The state court action represented a direct attempt to evade or undermine the District Court's previously-entered final judgment implementing a remedial congressional redistricting plan for the remainder of this decade, or until the state legislature enacts a valid plan of its own. Accordingly, the District Court properly enjoined the state court action under the All-Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283, in aid of the District Court's jurisdiction and to protect the *res judicata* effect of its final judgment implementing a remedial redistricting plan.

2. This Court's decision in *Growe v. Emison*, __ U.S. __, 113 S.Ct. 1075, 122 L.Ed.2d 38 (1993), was rendered on facts readily distinguishable from those in the instant case and did not require the lower courts to allow the state court action to proceed. *Growe* stands only for the proposition that federal courts should defer to the timely efforts of a state court to remedy an existing invalid plan. *Growe* does not require a federal court, once it has adopted

a valid remedial plan, to permit its remedial plan and its final judgment to be superseded or replaced by virtue of state court litigation subsequently commenced by dissatisfied voters whose interests were fully represented in the federal court action. The Petitioners' view of the *Growe* decision should be rejected because it would deprive federal courts of the ability to provide meaningful, stable relief in redistricting cases and would, in effect, confer jurisdiction upon state courts to decide purely political questions by substituting a new redistricting plan for a federal court plan which meets all legal criteria.

ARGUMENT

A. The standard of review

The grant of an injunction against state court proceedings is reviewable for an abuse of discretion. *Delta Airlines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582, 587 (11th Cir. 1983).

B. The District Court correctly enjoined the state court redistricting action pursuant to the All-Writs Act and the "in aid of jurisdiction" and "relitigation" exceptions to the Anti-Injunction Act.

The District Court's injunction against the state court redistricting action was authorized by the All-Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283. The All-Writs Act empowers federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," and has further been interpreted to permit the issuance of injunctions to protect or effectuate federal court judgments. *See, e.g., Kelly v. Merrill Lynch, Pierce, Fenner and Smith,* 985 F.2d 1067, 1069 (11th Cir. 1993); *Kinnear-Weed Corporation v. Humble Oil and Refining Company,* 441 F.2d 631, 637 (5th Cir.), *cert. denied,* 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971); *Ward v. Pennsylvania New York Central Transportation Company,* 456 F.2d 1046, 1048 (2d Cir. 1972). More specifically, the Anti-Injunction Act, while generally prohibiting federal courts from enjoining state court proceedings, expressly authorizes a federal court to issue such an injunction "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Here, the injunction against the state court redistricting action was proper both in aid of the jurisdiction the District Court assumed and exercised when it adopted a remedial congressional redistricting plan, and to protect or effectuate the District Court's judgment implementing that plan.

First, the District Court assumed jurisdiction of the congressional redistricting question in Alabama when it heard and sustained the Respondent's constitutional attack against the existing districts and prescribed a remedial redistricting plan. The class of African-American Intervenors, which included the Petitioners herein, expressly invoked and consented to that jurisdiction when they filed their complaint in intervention. The District Court's jurisdiction continued beyond its final judgment because a court which issues an injunction automatically retains jurisdiction to enforce and protect its decree. *See, e.g., Suntex Dairy v. Bergland,* 591 F.2d 1063, 1068 (5th Cir. 1979); *U.S. v. Fisher,* 864 F.2d 434 (7th Cir. 1988); *McCall-Bey v. Franzen,* 777 F.2d 1178 (7th Cir. 1985). The Petitioners' subsequent state court redistricting action represented an obvious attempt to evade or undermine the District Court's jurisdiction by asking the state court to replace the District Court's remedial plan with a plan of its own. Such an attempt obviously had the potential to greatly disrupt Alabama's electoral process because Alabama can have only one set of congressional districts. Had the state court action been allowed to proceed, it likely would have resulted in the formulation of a conflicting state court plan and neither the voters, the election officials, the incumbent congressmen, nor potential candidates would have known which plan should be given effect. Under these circumstances, it was particularly appropriate for the District Court to exercise its discretion by enjoining the state court redistricting action, thereby preventing needless confusion and disruption of the electoral process. Such an injunction is firmly supported by Eleventh Circuit precedent in an analogous setting. *See Battle v. Liberty National Life Insurance Company,* 877 F.2d 877 (11th Cir. 1989) (upholding injunction against a state court action asserting claims similar to those which had already been settled in a federal class action which affected a large segment of the state's population, reasoning that if the state court action was allowed to proceed it would nullify the work done by the federal court,

confuse a significant portion of the population, and subject the parties to added expense and conflicting orders).

Second, the "protect or effectuate its judgments" exception to the Anti-Injunction Act, also known as the "relitigation" exception, also supports the District Court's injunction against the state court action. This provision authorizes federal courts to enjoin state court proceedings in order to protect the *res judicata* effect of their judgments. *See Southwest Airlines Company v. Texas International Airlines,* 546 F.2d 84 (5th Cir. 1977). Federal courts apply the law of *res judicata* of the state in which they sit. *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. 1990). Under Alabama law, a judgment in a former action acts as a *res judicata* bar to a subsequent action if (1) the prior judgment was rendered on the merits, (2) the prior judgment was rendered by a court of competent jurisdiction, (3) the parties in both suits are substantially identical, and (4) the same cause of action is present in both suits. *Hughes v. Allenstein,* 514 So.2d 858 (Ala. 1987). The parties are deemed to be substantially identical if the party against whom *res judicata* is asserted was a party formerly. *AAA Equipment and Rental Company v. Bailey,* 384 So.2d 107, 109 (Ala. 1980). The "causes of action" are the same if they flow from a single act or set of circumstances and if substantially the same evidence would support a recovery in both actions. *See Geer Brothers, Inc. v. Crump,* 349 So.2d 577 (Ala. 1977). If the elements of *res judicata* are present, "any issue that *was or could have been* adjudicated in the prior action is barred from further litigation." *Hughes,* 514 So.2d at 860 (emphasis in original).

Here, the District Court's final judgment implementing a remedial redistricting plan was plainly *res judicata* as to the state court redistricting action filed by the Petitioners. The Petitioners do not dispute that the District Court's final judgment was rendered on the merits; neither do they dispute that the District Court had jurisdiction to enter the judgment. As members of the certified class of African-American Intervenors in the District

Court case, the Petitioners were parties to that action and were therefore bound by the District Court's judgments, including the denial of the Intervenor class' Rule 60(b) motion seeking implementation of a two-majority African-American district plan. *See Fowler v. Birmingham News Company,* 608 F.2d 1055 (5th Cir. 1979). Further, the relief the Petitioners seek in the state court is precisely the same relief their class sought and was denied in the District Court — a court-ordered plan containing two majority African-American districts. Therefore, the causes of action in both suits are the same for purposes of *res judicata.*[4] Under these circumstances, it was entirely appropriate for the District Court to protect its judgment by enjoining the Petitioners' attempts to re-litigate the redistricting question in state court after their class had lost in the District Court and this Court had summarily affirmed the District Court's rulings.

C. *Growe v. Emison* does not require reversal of the lower courts' rulings.

The sole basis upon which the Petitioners rest their claim is their assertion that this Court's decision in *Growe v. Emison,* __ U.S. __, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) requires federal

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[4] In their state court complaint, the Petitioners appeared to claim, among other things, that they were entitled to a two-majority African-American district plan under Section 2 of the Voting Rights Act. They have now expressly disavowed any such claim and now contend that their sole federal claim is their assertion that under *Growe v. Emison,* __ U.S. __, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), they are entitled to a redistricting plan drawn by a state court rather than a federal court. Petition for Writ of Certiorari, p. 10, n 7. The maintain that their state court action does not seek to "relitigate" or "overturn" the District Court's plan. *Id.* at p. 16. Indeed, the Petitioners conceded during oral argument in the Court of Appeals that the District Court's plan is valid and constitutional. Even accepting the Petitioners' present characterization of their claim, it still constitutes the "same cause of action" as the claim their class raised in the District Court because both claims arise from the same facts — i.e., the Alabama Legislature's failure to enact a valid congressional redistricting plan following the 1990 census.

court which have already implemented an admittedly valid, constitutional redistricting plan to "defer" to subsequent litigation in state court designed to replace the federal court's plan with a new state court plan. *Growe* does not stand for such a proposition and this Court should not extend *Growe* to the extreme lengths urged by the Petitioners.

The facts of *Growe* were vastly different from the facts of this case. In *Growe,* the existing electoral districts were unconstitutionally malapportioned. Concurrent lawsuits were pending in both the state and federal courts to remedy the existing malapportionment. The federal court enjoined the state court redistricting action even though the state court was prepared to implement a remedial plan in as timely a manner as the federal court. This Court reversed the District Court's injunction, holding that under *Scott v. Germano,* 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965), the District Court should have deferred to the state court's timely efforts to remedy the malapportioned districts. However, this Court also explicitly held that

> the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries. *Germano* requires deferral, not abstention.

Growe, 122 L.Ed.2d at 401. Here, unlike in *Growe,* a federal court has already implemented a remedial plan which has twice been tested and upheld on appeals to this Court, including one appeal by a certified class of litigants which includes the Petitioners, the state court plaintiffs. Moreover, it appears that the Petitioners now concede that there is nothing unconstitutional or illegal about the remedial plan prescribed by the District Court. (*See* footnote 4, *supra*). Nevertheless, after their class had fully litigated the redistricting question in federal court and lost, the

Petitioners then filed a new lawsuit in state court whose sole purpose was to replace an admittedly valid federal court plan with a new state court plan — apparently, simply for the sake of having a state court plan rather than a federal court plan in place. The Petitioners have neither alleged nor proven any change in circumstances since the entry of the District Court's final judgment that warrants a re-examination of the redistricting question. This Court' s holding in *Growe* does not compel a federal court to abandon a valid judgment and "defer" to such a repetitive and needless state court action. Rather, *Growe* requires only that a federal court defer, in the first instance, to a state court's timely efforts to remedy an existing malapportioned plan. Nothing in *Growe* negates the *res judicata* effect of a federal court's final judgment in a redistricting case or authorizes a state court to supersede a valid federal court remedial plan with a plan of its own.

The Petitioners argue that in light of *Growe*, a state court must always be considered the equivalent of a state legislature for purposes of redistricting and that since a federal court plan is always susceptible to later change by the legislature, such a plan can never have any *res judicata* effect on subsequent redistricting litigation in a state court. This argument represents a wholly unwarranted expansion of the holding in *Growe* which this Court should reject, for several reasons.

First, if this Court accepts the Petitioners' interpretation of *Growe*, it would permit federal court redistricting orders to be cast aside at the whim of any dissatisfied voter who, like the Petitioners herein, can locate a friendly defendant to sue in a new state court redistricting action. Such an expansion of *Growe* would destroy the ability of federal courts to formulate stable and meaningful relief in redistricting cases. It would also subject the electoral process to constant flux and disarray. Redistricting cases are so politically charged, and affect so many people, that there are sure to be many individuals who would seize any

opportunity to replace a federal court redistricting plan with a state court plan politically more to their liking — and this is exactly what the Petitioners here are attempting to do.

Second, the Petitioners' interpretation of *Growe* reflects a failure to recognize the very limited role that courts — whether state or federal — have in redistricting. If it is true that, as this Court recognized in *Growe,* reapportionment is primarily a matter of state rather than federal concern, then it is equally true that "reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims,* 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In other words, a court's role in redistricting is limited to remedying an *existing legally defective or invalid plan* when the legislature fails to do so in a timely manner. Once a court of competent jurisdiction implements such a valid remedy, the role of the courts is over, absent some later change in circumstances rendering the court's plan invalid. Assuming the court's plan is a valid one, the question of whether that plan should be changed then becomes purely a *political* question for the legislature. In this case, the Petitioners have conceded that the District Court's plan is valid and constitutional. Therefore, they are asking the state court not to provide a legal remedy for an existing invalid plan, but to decide, as a political matter only, whether the District Court's plan should be replaced. Nothing in *Growe* intimates that this Court intended to confer jurisdiction on the state courts to decide political questions, even assuming that this Court had the power to do so. Further, the Petitioners have not pointed to any provision of Alabama law which gives state courts the authority to decide political questions. Indeed, Alabama law is to the contrary. *See, e.g., Longshore v. City of Homewood,* 277 Ala. 444, 446, 171 So.2d 453 (1965) ("elections belong to the

political branch of the government, and, in the absence of special constitutional or statutory provisions, are beyond the control of judicial power"); *Ex parte State ex rel Tucker*, 236 Ala. 284, 181 So. 761 (1938) (as a general rule, elections are a political matter which are beyond the power of a court of equity to control).

For the foregoing reasons, the principle of deference to state courts reiterated in *Growe* does not apply to this case and should not be extended to apply to this case. The Petitioners' reliance on *Growe* is therefore misplaced, as both the District Court and the Court of Appeals correctly recognized.

CONCLUSION

The lower courts properly enjoined the state court redistricting action pursuant to the authority granted under the All-Writs Act and the Anti-Injunction Act. The injunction is not contrary to this Court's decision in *Growe*, and the Petitioners have not established that any "special and important reasons" exist for granting certiorari. *See* Supreme Court Rule 10.1. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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DEC - 6 1993
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993
No. 93-781

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON and ANDREW HAYDEN,

Petitioners,

vs.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM; and JIM BENNETT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit

RESPONDENT ALABAMA SECRETARY OF STATE JIM BENNETT'S RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented

1. Did the federal courts below err in enjoining state court proceedings concerned with the formulation and implementation of a congressional redistricting plan for the State of Alabama?

2. Where the District Court recognized that its 1992 interim plan would be superseded if the state legislature adopted a congressional redistricting plan for the 1994 elections, did the courts below err in not affording equal deference to the state judiciary?

Parties

The parties in the Court of Appeals are all shown in the caption.

Table of Contents

Questions Presented i

Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of Facts 2

Reasons for Granting the Writ 3

Argument..... 5

Conclusion 11

Table of Authorities

Cases:

Chapman v. Meier, 420 U.S. 1,
95 S.Ct. 751,
42 L.Ed.2d 766 (1975)..... 3, 5, 8

Growe v. Emison, ____ U.S. ____,
113 S.Ct. 1075,
122 L.Ed.2d 388 (1993) 3, 4, 6
8, 10

Scott v. Germano, 381 U.S. 407,
85 S.Ct. 1525,
14 L.Ed.2d 477 (1965)..... 3, 5, 8

Sinkfield v. Bennett, C. A.
No. 93-689-PR (Circuit Court of
Montgomery County, Alabama)..... 4

Wesch v. Hunt, 785 F. Supp. 1491
(S. D. Ala. 1992)..... 7

Statutes and Constitutional Provisions:

U.S. Const., Art.I, §2..... 5

Code of Alabama, 1975 §17-16-6.... 10

Code of Alabama, 1975 §17-16-11... 10

Opinions Below

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding the opinions below as presented on p. 1 of their Petition for Writ of Certiorari.

Jurisdiction

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding jurisdiction as presented on pp. 1-2 of their Petition for Writ of Certiorari.

Constitutional and Statutory Provisions Involved

Secretary Bennett adopts the statement of the Sinkfield Petitioners regarding the constitutional and statutory provisions involved as presented on p. 2 of their Petition for Writ of Certiorari.

Statement of Facts

Secretary Bennett adopts the Sinkfield Petitioners' Statement of Facts as presented on pp. 3-11 of their Petition for Writ of Certiorari.

Reasons for Granting the Writ

Respondent Bennett adopts the reasons for granting the writ presented by the Sinkfield Petitioners in their Petition for Writ of Certiorari and in addition states as follows:

This Court should grant a writ of certiorari because the Court of Appeals' decision squarely conflicts with Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965); and Growe v. Emison, ____ U.S. ____, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), in which this Court ruled that federal courts should defer to states' efforts to redistrict themselves.

Under these decisions, the deference the federal courts should give to state redistricting efforts extends not only to state legislatures but to state court redis-

tricting proceedings as well. The District Court recognized that its 1992 interim plan would be superseded if the state legislature adopted a congressional redistricting plan for the 1994 elections. However, the District Court erred in not affording the state judiciary equal deference, as required by this Court in Growe v. Emison, and the Court of Appeals similarly erred in affirming the District Court's decision. Therefore, the Eleventh Circuit Court of Appeals should be reversed and the state court congressional redistricting litigation in Sinkfield v. Bennett, C. A. No. 93-689-PR (Circuit Court of Montgomery County, Alabama) allowed to proceed.

Argument

Redistricting Alabama's congressional districts is the prerogative of the State of Alabama, through its legislature or--should the legislature fail to act--through other state agencies, including the state judiciary. The United States Constitution leaves the primary responsibility for apportioning state legislative and federal congressional districts with the states themselves. U. S. Const., Art. I, § 2.

This Court has held that responsibility for reapportionment is primarily the duty of a state "through its legislature or other body" rather than of federal courts. Chapman v. Meier, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766, 784 (1975). In Scott v. Germano, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965), this Court held that both the legislative and judicial branches

of state government are preferred to federal courts as agents of reapportionment. 381 U.S. 407, 409.

Finally, this Court's most recent decision regarding the relation of state and federal courts relative to redistricting proceedings in Growe v. Emison, ____ U.S. ____, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), is unequivocal in affirming the primacy of states, including their judiciaries, in designing their legislative and congressional districts. This primacy "compels a federal court to defer" to state court redistricting proceedings. 113 S.Ct. at 1081.

In its July 21, 1993 order enjoining state court congressional redistricting proceedings, the District Court attempts to distinguish Growe by stating that unlike the case at bar, the state in Growe was operating under an unconstitutional plan and the

federal judicial proceeding was parallel to the state court case rather than prior to it (See Petitioners' Appendix, p. 1-c). The District Court order stated that if a constitutional plan is put in place by a federal court, individual citizens cannot later attack the plan in a state court. However, contrary to the District Court's order, the issue is not whether federal court-ordered congressional redistricting plan under which the State of Alabama is now operating is constitutional. The issue, rather, is whether the District Court must give the state judiciary the same deference as it does the state legislature with respect to redistricting.

The congressional redistricting plan implemented in Wesch v. Hunt, 785 F. Supp. 1491 (S. D. Ala. 1992) under the District Court's final judgment is on its own terms an **interim** plan which shall not remain in

effect in the event the Alabama Legislature enacts a redistricting plan and has the same precleared (See Petitioners' Appendix, p. 24-b). Under Growe v. Emison, the deference which the District Court extends to legislative action on redistricting must be understood to extend to **state judicial action** on redistricting as well. Both are branches of the state which have primacy over federal courts in redistricting matters. Respondent Bennett's position is that, in light of the deference to state court redistricting proceedings mandated under Scott v. Germano, Chapman v. Meier and Growe v. Emison, a state court congressional redistricting plan is able to supplant an interim federal plan in the same way as can a legislatively-produced plan.

In Growe v. Emison, this Court held that there is only one justification compelling enough to allow a federal court to

interfere with a state's exercise of its redistricting prerogative:

> Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportion- ment nor permit federal litigation to be used to impede it. Growe v. Emison, 113 S.Ct. 1075 (1993).

The single reason given by this Court to allow a federal court to intervene in a state's redistricting process--failure by the state to adopt a plan in time to be used in the upcoming elections--is manifestly not present in this case. The state court in this case was proceeding in timely fashion until those proceedings were enjoined by the District Court, which injunction was at first stayed and then later reinstated by the Court of Appeals. The state court could still formulate a congressional redistricting plan in time for the upcoming election cycle if only allowed to

do so. The filing deadline for congressional primary elections in Alabama is April 8, 1994; the primary election itself is on June 7, 1994. Code of Alabama, 1975 § 17-16-6 (Primary to be held on first Tuesday in June) and § 17-16-11 (Filing deadline for primary is no later than 60 days before the date of the primary).

Therefore, the necessary justification for federal judicial intervention in the Montgomery County Circuit Court congressional redistricting proceedings is absent. The federal court injunction of state court redistricting proceedings under these circumstances constitutes just the sort of "affirmative obstruction" of state reapportionment efforts that this Court warned against in Growe v. Emison. The District Court's injunction, and the Court of Appeals affirmance thereof, in effect bars the state court from doing what state courts have been en-

couraged to do by this Court for the past several decades.

Conclusion

States have the primary responsibility for redistricting their congressional districts. In situations in which a federal court congressional redistricting plan is already in place, a state may (and constitutionally should) still act to fashion its own plan, through its legislature or through its judiciary. In the instant case, the federal district court has properly fulfilled its function of serving as a "backstop" when Alabama's state legislature failed to pass a congressional redistricting plan and obtain preclearance for it prior to the 1992 election cycle. The State of Alabama, acting through its state courts, is now prepared to proceed with congressional redistricting for the next round of elec-

tions. It should be allowed to do so. Accordingly, Respondent Secretary of State Bennett respectfully requests that this Court grant the writ of certiorari sought by the Sinkfield Petitioners in this proceeding.

Respectfully submitted,

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No. 93-781

DEC 29 1993
CLERK

In The

Supreme Court of the United States

October Term, 1993

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON and ANDREW HAYDEN,

Petitioners,

vs.

PAUL CHARLES WESCH; MICHAEL FIGURES; CHARLES STEELE; GARRIA SPENCER; JAMES FOLSOM, Governor of the State of Alabama; JIM BENNETT, Secretary of State,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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Questions Presented

In *Growe v Emison*, __ US __, 113 SCt 1075, 122 LEd2d 388 (1993), this Court reversed a district court for failing to defer to a state court in a redistricting case. In light of that case, the following questions are presented here:

1. Where the State's failure to adopt a valid congressional redistricting plan led the district court to adopt its own interim plan in time for the 1992 elections, did the courts below err in barring a state court from adopting a plan for the 1994 elections?

2. Where the district court's 1992 order acknowledged that its interim plan would be superseded if the Legislature adopted a plan for subsequent elections, did the courts below err by not according similar deference to the state judicial process?

3. Do principles of federalism bar federal courts from transforming their interim redistricting plans into permanent ones by enjoining the State's judicial redistricting process?

Petitioners' Reply in Support of Certiorari

The parties in this case represent fundamentally different points of view. Petitioners, supported by the chief officers of the State of Alabama, rely on the primacy of state institutions (whether legislative or judicial) in the redistricting process, a primacy recently reaffirmed in *Growe v Emison*, 113 SCt 1075 (1993). Respondents, by contrast, argue that state legislatures and state courts have different degrees of primacy, so that whereas a state legislature can adopt a redistricting plan at any time, a state court can act only up to the time when a federal court adopts an interim plan.

Respondents' position trivializes *Growe v Emison* and misstates the roles of both the federal courts and the state courts.

1. The basic rule of *Growe v Emison* is a rule of federalism. It recognizes that redistricting is a state matter, and under our Constitution, that means it is up to the State to decide which of its institutions shall play which role in that matter. As this Court said in *Erie R. Co. v Tompkins*, 304 US 64, 78 (1938):

> "And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Accordingly, if the State of Alabama is empowered to adopt a redistricting plan which supplants a federal court's interim plan, the rule of federalism dictates that it is for

the State of Alabama to choose which of its institutions may adopt its plan.[1]

Rules like res judicata are essentially first-come first-serve rules, designed to provide some order in areas where there is none. In redistricting, though, the rules of federalism already provide order in the preference for state-drawn plans over federally drawn plans. To nullify that preference by a res judicata rule not only misuses the res judicata rule, but violates the precepts of *Growe* and *Erie*.[2]

2. A federal court draws a redistricting plan only to fill a gap left by the State. That is why it is called "interim." Yet the respondents here seek to attach permanence to the federal court's plan by labeling it a "plan for the rest of the decade." Op. Cert., p. 7.

As an interim plan designed only to allow an election to be held constitutionally, the federal court plan would not be "interfered with" simply because the State adopted its own plan for a later election. And if this is true, it makes no difference whether the State's plan for the later election is legislative or judicial.[3]

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[1]The States have employed a variety of methods to provide for congressional districting. Although legislative enactment is the usual method, states have redrawn congressional districts using assorted judicial and extra-judicial forums, including state courts of general jurisdiction protecting the constitutional rights of citizens.

[2]Or, put another way, what is the "repose interest" in an *interim* plan?

[3]Another interest of the citizenry is affected if the federal court plan lingers on: the preclearance protections of the Voting Rights Act, 42 USC § 1973c. Since a plan drawn by a federal court is an exception to the preclearance requirement, the continued use of the federal court plan in successive elections aggravates the exception. The consequences

(continued...)

3. Respondents finally suggest that the Alabama state courts may not even have jurisdiction to decide redistricting cases. That suggestion is flatly wrong, as the Alabama Supreme Court has specifically shown in just the past week in answering that precise certified question from a different federal court. *Brooks v Hobbie*, ___ So2d ___, 1993 Ala LEXIS 1197 (Ala, Dec. 22, 1993).

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[3](...continued)
are especially serious in this case where the federal court's interim plan uses the same features that led the U.S. Attorney General to issue a Voting Rights Act objection to a plan which had been adopted by the State Legislature.

In a covered jurisdiction like Alabama, a state court's redistricting plan—like a plan adopted by statute, but unlike a federal court plan—would have to be precleared before it could be implemented. *Hathorn v Lovorn*, 457 US 255 (1982). The ruling of the lower federal courts in the instant case if allowed to stand, will have the practical effect of denying black citizens of Alabama the protection of § 5 for an entire decade and will frustrate the careful preclearance scheme of the Voting Rights Act. If *Growe v Emison*'s principles of federalism were followed as this Court intended, black citizens like Darryl Sinkfield could require the Alabama courts to respond to the Legislature's default with a redistricting plan that would have to withstand § 5 scrutiny.

Conclusion

Nothing in *Growe v Emison* justifies the distinctions that Respondents would like to interpolate. This Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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